No. 546

Supreme Court of the United States

OCTOBER TERM, 1920

MAX W. STOEHR

Appellant

against

JAMES N. WALLACE and others

Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO BRIEF

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SUBJECT INDEX

I

Two late English cases upon the effect of war upon contracts

The decisions which we are about to consider are among the greatest decisions that have been made by any Court upon the subject that is up for decision in the case at bar. Their reasoning is so masterly; the exposition of the decided law is so luminous; their grasp of the great principles of public policy involved is so wise and is so truly in the great and best traditions of the greatest Courts of the world; their reasoning is so free from mere technicalities; they render obsolete so many ill-considered discussions of the question; the rule and the test that they apply are so conclusive and of such universal application; they show such a broad understanding of the great and vital interests that were involved in the titanic struggle that is not yet ended; they are such splendid examples of judicial courage; the conclusions they have reached are so certain to become the general law of the world; they are such a complete demonstration of the fact that, when war has broken all the bonds of custom, all treaties, all conventions, all intercourse, and has, on the side of the Germans, obliterated all or all but all considerations of humanity itself, that it is futile and provocative of uncertainty for Courts to attempt to adjust and to re-create broken contracts instead of leaving all such intricate and momentous questions to be dealt with by those whose duty it is to formulate the terms of peace and to fix the private rights of the citizens or subjects whose countries have been at war—because of all these considerations we offer no apology for considering them here at such length as they so richly deserve.

I

Zinc Corporation, Limited v. Hirsch and others (1916), 1 K.B. 541. It was decided in the King's Bench Division August 3, September 7, 1915, and in the Court of Appeal

November 18, 19; December 15, 16, 21, 1915. The plaintiff was a company incorporated in England, and agreed before the war to sell, and the defendants, who resided and carried on business in Germany, agreed to purchase during each of the ten years 1910 to 1919, both inclusive, the whole of the plaintiffs' production of zinc concentrates at the plaintiffs' mine in Australia. The production was agreed not to be less than 85,000 tons nor more than 95,000 tons in each year. The plaintiffs were prohibited, so long as the contract should be in force, from selling any zinc concentrates to any person other than the defendants. The defendants were entitled at any time to leave 2200 tons of concentrates on the plaintiffs' floors and 800 tons in their vats at the plaintiffs' expense.

By clause 17 of the contract of 1908 it was provided that in the event of strikes, suspension of labour, floods, fire, stoppage of water supply, acts of God, *"force majeure,* or any cause beyond the control of either the sellers or the buyers" preventing or delaying the carrying out of the contract "then this agreement shall be suspended during the continuance of any and every such disability".

War was not specified as a cause of suspension.

The contract contained various provisions as to notices being given, as to fixing the price of and the method and time of payment for the concentrates, as to weighing, sampling and assaying the concentrates, and as to other matters.

On the outbreak of the war between Great Britain and Germany on August 4, 1914, the defendants became alien enemies.

The contract was acted upon until a few days before August 4, 1914, when the defendants gave to the plaintiffs notice that they should discontinue taking ore, and deliveries of zinc concentrates by the plaintiffs to the defendants thereupon ceased.

On the trial the chairman of the plaintiff company demonstrated the difficulty the plaintiffs would have in selling their concentrates if, on the termination of the war, they were bound to resume deliveries to the defendants. The action was for a declaration that the agreement was

abrogated and voided by the existence of a state of war between Great Britain and Germany on August 4, 1914, and that the plaintiffs should be released from any duty or obligation AT ANY TIME to supply to the defendants zinc as provided in the contract.

Counsel for the plaintiffs in the Kings Bench Division argued that the provisions of clause 17 that "this agreement shall be suspended during the continuance of any and every such disability" meant only that, on the assumption that war came within the category of disabilities therein mentioned, deliveries of the zinc concentrates should be suspended, and that the provision did not mean that the whole agreement should be suspended. He argued that the further performance of the contract therefore became illegal, inasmuch as it would involve commercial intercourse with the enemy during the war.

One of the most significant things in the argument of counsel for the plaintiffs and of counsel for the defendants and in the Judge's opinion is that the matter was not treated technically but was considered on the ground of illegality and on the broad principles of public policy.

Counsel for the plaintiffs in the court below also argued that if in the case of a contract made before the war with a person who becomes an alien enemy "anything remains to be done under it after the outbreak of war BEYOND MERE PAYMENT, the further performance of the contract becomes illegal and it is dissolved. Where, however, the cause of action accrued before the war, AND NOTHING REMAINS TO BE DONE UNDER THE CONTRACT EXCEPT PAYMENT, the contract is only suspended during the war" (1916, 1 K.B. 545).

Counsel for the plaintiffs then quoted from the case of *Janson v. Driefontein Consolidated Mines* (1902) A. C. 484, 509, where Lord Lindley said:

> "War produces a state of things giving rise to well known special rules. It prohibits all trading with the enemy except with the Royal license, AND DISSOLVES ALL CONTRACTS WHICH INVOLVE SUCH TRADING".

Lord Lindley referred to the case of *Esposito v. Bowden* (1857) 7 E. & B. 763, 784, where Willes, J. in delivering the judgment of the Exchequer Chamber, adopted the language of Lord Tenterden in his work on *Shipping, fifth edition*, page 427:

> "If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, THE AGREEMENT IS ABSOLUTELY DISSOLVED."

Counsel for the plaintiff also quoted Lord Alvanley, C. J. in *Furtado v. Rogers* (1823) 3 Bos. & P. 191, 198, to the effect that "it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country".

Counsel for the plaintiff also cited the case of *Robson v. Premier Oil and Pipe Line Co.* (1915) 2 Ch. 124, 136, where it was laid down by the Court of Appeal that "a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy" came within the principle upon which intercourse is prohibited, namely, that of public policy.

Counsel for the plaintiff then argued:

> "A negative clause is within that principle. The test, therefore, is, is the contract detrimental to the interests of this country or beneficial to the enemy country? If it is, it is illegal and is dissolved on the outbreak of the war. Contracts which involve commercial intercourse with the enemy are therefore illegal."

It will thus be seen that counsel for the plaintiff dealt with the question upon large lines of public policy and not upon mere technical considerations.

Compston, K. C., for the defendants, argued that the operation of clause 17 was merely "to suspend delivery of the concentrates during the war", and that the con-

tract would still remain in force, "because nothing would have to be done except adjustment of the accounts, and that would not involve trading with the enemy."

Counsel for the defendants also stated their willingness "to consent to the plaintiffs selling concentrates during the war, so that there would be nothing contrary to the interests of Great Britain in the contract being suspended duing that period." He argued that the contract was only suspended by war AS TO DELIVERIES, and that it was only dissolved so far as trading with the enemy was concerned, and that if the war prevented the further performance of "part of the contract" there was NO reason why it should prevent the performance of the rest of the contract, and that "A contract for delivery by instalments stands upon a different footing from other contracts" and that the court could eliminate the illegality and "say that deliveries are to be resumed after the war as being perfectly legal."

Counsel for the defendant also argued: "An executory contract is dissolved ONLY IF IT MUST BE PERFORMED DURING THE WAR".

It will thus be seen that the plaintiffs contended that the outbreak of the war rendered "the further performance of the contract illegal and that it was dissolved".

The defendants, on the other hand, contended that "it was merely suspended during the continuance of the war", and they relied mainly on clause 17.

Bray, J., delivering the judgment of the Kings Bench below, said that he thought that, apart from that clause, the contract would be dissolved. He then proceeded to discuss the effects of the war, and among other things said:

> "Lord Lindley in *Janson v. Driefontein Consolidated Mines* (1902) A. C. 484, 509, stated the law thus: 'War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal license, and dissolves all contracts which involve such trading.'
>
> "The passage in *Esposito v. Bowden*, 7 E. & B. 763, 784, relied on by Lord Lindley is as follows:

'If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved.'

"I think there can be no doubt that that is the law. I THINK, FURTHER, THAT IF THE PERFORMANCE OF ANY TERM OF THE AGREEMENT OR THE EXERCISE OF ANY RIGHT OR OPTION GIVEN BY IT BE RENDERED UNLAWFUL THE WHOLE AGREEMENT IS DISSOLVED. THE COURT CANNOT SUBSTITUTE FOR THE AGREEMENT MADE BY THE PARTIES AN AGREEMENT MINUS ANY ONE OF ITS TERMS. THE PARTIES HAVE NEVER SO AGREED. It is not contended here that the agreement was severable."

(Parenthetically it might be argued with reference to *Storkr v. Wallace et al.*, that there was more to be done between the New York company and the Leipzig company than the payment of money. There were "exercises of rights" and "options" that might be given, as has been shown later.)

Bray, J., gave careful consideration to the provisions of clause 17, and said that he thought that the natural meaning of the words "This agreement shall be suspended" was that ALL the provisions were to be suspended and that ALL of the rights and obligations of each of the parties were to cease during the continuance of the cause of suspension. But he pointed out that counsel for the defendant had been bound to admit that that could not be the meaning, and that it could not have been the intention of the parties, for instance, that the obligation for payment for ores already delivered should be suspended, but that that and the necessary steps for arriving at the amount due were the only exceptions, and that they would involve no illegal act.

He further pointed out that the plaintiffs, on the other hand, relied upon "many of the clauses of the agreement

as containing provisions which equally the parties could not have intended to be suspended, and which would involve commercial intercourse."

He therefore examined the whole agreement, and as a result of his examination he stated that he had come to the conclusion that the plaintiffs' contention was correct and "that suspension of the agreement meant only suspension of deliveries. The end and object of the agreement was the sale and delivery by plaintiffs to defendants of a certain quantity of ores produced by the plaintiffs at Broken Hill, Australia."

After examining the provisions of the agreement he held that upon its true construction "the only suspension contemplated under it was the suspension of the deliveries of zinc concentrates, and that the right to give notices and the jurisdiction of arbitrators was not suspended; THAT IT WOULD BE ILLEGAL FOR THE PLAINTIFFS TO GIVE SUCH NOTICES DURING THE WAR; THAT THE GIVING OF SUCH NOTICES WOULD CONSTITUTE COMMERCIAL INTERCOURSE, AND WOULD BE THE EXERCISE OF A PRIVILEGE GIVEN TO THE PLAINTIFFS BY THE CONTRACT AND WOULD BE PART AND PARCEL OF THE CONTRACT."

He also came to the conclusion that he must construe the words of clause 17 as providing only for "suspension of deliveries of zinc concentrates" and that "there would still remain things to be done, OR RIGHTS TO BE EXERCISED, which, after the outbreak of war between Great Britain and Germany, WOULD BE ILLEGAL."

He concluded his opinion as follows:

> "It results, therefore, I think, that the contract was dissolved on August 4, 1914, and that the plaintiffs are entitled to a declaration to that effect."

The defendants appealed.

So in the case at bar we have the whole contract executory WITH NOT EVEN THE TRANSFER OF THE BARE LEGAL TITLE TO THE NEW YORK COMPANY. If the exercise of options as contemplated by the contract ON ITS FACE, the giving of notices, the forfeiture of rights, the delivery of shares, the fixing of the purchase price and the payment

of the purchase price, are all illegal, then the Court cannot "substitute for the agreement made by the parties an agreement minus any one of its terms" and the legal title and beneficial interest remains in the Leipzig company.

Inasmuch as the agreement involved the EXERCISE OF RIGHTS AND OPTIONS which rendered it unlawful, inasmuch as it contemplated payments which became illegal, the "whole agreement was dissolved". The result of the dissolution of the whole agreement meant that the shares were subject to seizure by the Alien Property Custodian, just as though the 14,900 shares had continued in the names of Hans Stoehr and Max Stoehr as trustees for the Leipzig corporation.

The *Zinc case* came on before the English Court of Appeal November 18 and 19 and December 15 and 16, 1915.

The opinions in the Court of Appeal in the *Zinc case* are in (1916) 1 K. B. 551, et seq.

There were three opinions in the Court of Appeal.

As in the court below, the plaintiffs contended that the effect of the war was to "put an end to and dissolve the contract".

Again the defendants contended that "the contract was merely suspended during the war and would again immediately become operative on the restoration of peace".

A great deal was said about the provisions of clause 17, and Lord Justice Eady, after considering the authorities and exhaustively examining the numerous and intricate provisions of the agreement, held that it was not possible to give to the words in clause 17 "This agreement shall be suspended" their natural and ordinary meaning, and that the words meant that "deliveries under the contract are to be suspended". The result of that construction was that the agreement did "not contain a clause suspending its *entire* operation during the war, but it is to be read as if the clause merely suspended deliveries, leaving the rest of the contract subsisting between the parties to be performed according to its tenor".

Having thus decided the meaning of the contract, he dealt with it in a large, UNTECHNICAL way. Large questions of policy were involved.

Lord Justice Eady said (1916) 1 K. B. 556:

> "But to carry out during the war *any part* of the contract would involve intercourse with the enemy, and so would be illegal. Under clause 2 of the agreement of 1910 the NOTICE is to be given before April 30 in each year. This NOTICE regulates not only the yearly quantity but the monthly quantity, as delivery is to be given and taken in about equal monthly deliveries. Again, the notice exercising the OPTION under clause 2 of the agreement of 1910 cannot be given. Again, under clause 6 of the agreement of 1910 NOTICE is to be given before July 5 in the year following the year of delivery. There are other clauses, including the arbitration clause, 21, of the agreement of 1908, ALL POINTING TO THE NECESSITY OF INTERCOURSE, although deliveries may be suspended under clause 17, and thus rendering the further performance of the contract illegal. The result is that the outbreak of war has DISSOLVED the contract between the parties so far as regards the future performance after August 4, 1914."

So in the case at bar the contract involved "exercising options" and the giving of notices.

It cannot be contended in the case at bar, as it was in the *Zinc case,* that the parties INTENDED that the operation of the contract should be suspended during the war. The contract here was made in express view of the war. It bears on its face the demonstration of the intention of the parties. The Heyn & Covington letter removes doubt on that subject. And yet, although it was made upon the eve of war and with direct relation to war, the parties did not provide even on the FACE of it that any rights or the whole of it should be suspended during the war. That feature of the *Zinc case* is out of this case. Here the parties expressly intended on the *face* of it and provided for certain things TO BE DONE DURING THE WAR. Inasmuch as there was no provision in the contract providing for the suspension of rights or the suspension of any parts of the contract or the suspension of the contract as a whole during the

war, the principle applies that, as the performance of the contract during the war would involve intercourse with the enemy, upon the outbreak of the war it became illegal and was dissolved. As there was nothing in the contract providing for the suspension of any part of the contract or of all of it during the war, it was dissolved "so far as regards future performance" after April 6, 1917.

What result flows from this? If all the parts of the contract were dissolved so far as future performance is concerned, the legal title and the beneficial ownership remained in the Leipzig company. But there our Trading with the Enemy Act steps in and provides that rights possessed by the German enemies, namely, ownership by the Leipzig corporation upon the dissolution of the contract, are vested in the Alien Property Custodian.

Now to resume from the opinion of Lord Justice Eady: Having demonstrated that the exercise of the rights and options provided for in the contract made it illegal, he considered the case from another point of view, that of public policy. He pointed out that the contract not only provided that the defendants should purchase the plaintiffs' whole production, but it also stipulated that the plaintiffs should not sell their concentrates to any other person, and that the negative stipulation remained in force, according to the tenor of the agreement, as well during a war as during a temporary strike or accident or breakdown of machinery. He pointed out that by clause 5 the defendants had the right to leave as much as 2200 tons of concentrates on the plaintiffs' floors and 800 tons in their vats at plaintiffs' risk for an indefinite period. He pointed out that thus the defendants could not take delivery, and yet, according to the contract, the plaintiffs could not sell their productions elsewhere, and must keep their floors and vats and other premises encumbered with the concentrates which they were not permitted to dispose of, and thus the whole of the industry must be brought to an entire standstill. Then Lord Eady laid down the following significant principles:

> "I have in my mind and am fully aware of the letter of the defendants' solicitors of July 20, 1915"

(the letter stating that the defendants "would have no objection to agreeing that the concentrates produced during the war should be free for your clients to dispose of if it would end the question in this case"), "BUT THE RIGHTS OF THE PARTIES MUST BE CONSIDERED WITH REFERENCE TO THEIR POSITION UNDER THE AGREEMENT AT THE OUTBREAK OF WAR. Moreover, even if the plaintiffs were entitled to sell elsewhere any concentrates produced during the war, it might be a matter of extreme difficulty to the plaintiffs to do so to the best advantage if they are unable to enter into forward contracts for definite periods, and can only dispose of such concentrates as at the moment they have on hand, and with the risk of being called upon, possibly at short notice, to resume deliveries to the defendants. The effect of such an agreement as the present one, dealing with an important commercial product on a very large scale, is to prevent the resources of the country from being developed and labour from being employed, and the value of the mineral from being realized and the proceeds utilized in the best interests of the country. MOREOVER, THE RESULT OF PRESERVING INTACT FOR THE DEFENDANTS (AS THE AGREEMENT PURPORTS TO DO) ALL CONCENTRATES ON THE FLOORS, IN THE VATS, OR OTHERWISE MADE READY BY THE PLAINTIFFS WOULD BE TO PROTECT THE DEFENDANTS' TRADE DURING THE WAR AND ENABLE THE DEFENDANTS UPON THE CONCLUSION OF PEACE TO RESUME THEIR TRADE AS SPEEDILY AND IN AS GREAT VOLUME AS POSSIBLE, AND SO TO DIMINISH THE EFFECT OF WAR ON THE COMMERCIAL PROSPERITY OF THE ENEMY COUNTRY, WHICH IT IS THE OBJECT OF THIS COUNTRY DURING THE WAR TO DESTROY. TO RECOGNIZE SUCH A CONTRACT DURING WAR AND TO GIVE EFFECT TO IT BY HOLDING THAT IT REMAINED LEGALLY BINDING UPON THE CONTRACTING PARTIES WOULD BE TO DEFEAT THE OBJECT OF THIS COUNTRY IN CRIPPLING THE COMMERCE OF THE ENEMY. 'IT WOULD BE TO UNDO BY MEANS OF BRITISH TRIBUNALS THE WORK DONE FOR THE BRITISH

NATION BY ITS NAVAL OR MILITARY FORCES': *per Lord Lindley in Janson v. Driefontein Consolidated Mines (1902) A. C. 507.* SUCH AN AGREEMENT IS, IN MY OPINION, VOID AS TENDING TO ASSIST THE KING'S ENEMIES. TO CARRY OUT SUCH AN AGREEMENT DURING THE WAR, AND TO WITHDRAW GOODS FROM COMMERCE AND PRESERVE THEM FOR THE ENEMY AFTER THE WAR, IS LITTLE REMOVED FROM ACTUALLY TRADING WITH THE ENEMY. *In Furtado v. Rogers, 3 Bos. & P. 191, 198,* LORD ALVANLEY, IN DELIVERING THE JUDGMENT OF THE COURT OF COMMON PLEAS, SAID: 'WE ARE ALL OF OPINION THAT ON THE PRINCIPLES OF THE ENGLISH LAW IT IS NOT COMPETENT TO ANY SUBJECT TO ENTER INTO A CONTRACT TO DO ANYTHING WHICH MAY BE DETRIMENTAL TO THE INTERESTS OF HIS OWN COUNTRY; AND THAT SUCH A CONTRACT IS AS MUCH PROHIBITED AS IF IT HAD BEEN EXPRESSLY FORBIDDEN BY ACT OF PARLIAMENT.'

"Moreover, upon what ground can an agreement not to sell goods during the war be binding in favor of a person who has become an alien enemy? HE CANNOT DURING THE WAR ENFORCE SUCH AN AGREEMENT. The true answer must be that the tie has become, not suspended, BUT DISSOLVED BY THE WAR. In the case of *The Hoop* 1 C. Rob. 196, 200, Lord Stowell said: 'In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*..... A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a Court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority.' This language is as applicable to the future performance of a contract

entered into before the war as it is to entering into a contract during the war. The impossibility of enforcing it by an appeal to the law is the same in each case.

"Much of the language used by Chancellor Kent in *Griswold* v. *Waddington* (1819) 16 Johnson, Sup. Ct. New York, 438 (Court of Errors of New York) with reference to a contract of partnership, which he held was dissolved by war, is also applicable to the present case.

"I am of opinion that the contract in question BECAME DISSOLVED ON THE OUTBREAK OF WAR, and that the judgment below was right, and that this appeal fails."

Lord Justice Phillimore delivered a separate judgment, in which, after analyzing the contract, he said:

"The defendants being German subjects, this is an agreement which cannot continue to be performed during the war. I do not think there is any doubt about this. It would involve commercial intercourse with the enemy, which is unquestionably unlawful: *The Hoop*, 1 C. Rob. 196; *Esposito* v. *Bowden*, 7 E. & B. 763; *Furtado* v. *Rogers*, 3 Bos. & P. 191; *Janson* v. *Driefontein Consolidated Mines* (1902) A. C. 484; *Robson* v. *Premier Oil and Pipe Line Co.* (1915) 2 Ch. 124, and numerous other cases, English and American. The American cases up to that date are collected in *Kershaw* v. *Kelsey*, 100 Mass. 561.

"This agreement being incapable of continued performance during the war, 'the end of which cannot be foreseen' (*Esposito* v. *Bowden*, 7 E. & B. 792), is prima facie dissolved, abrogated, or avoided by the war: see *Esposito* v. *Bowden*, 7 E. & B. 783, and other cases."

Lord Justice Phillimore then dealt with the contention of the defendants that the general rule that war dissolved contracts did not apply because, as the defendants claimed,

the parties had made provision for that event and had provided for the suspension or the "putting to sleep" of the agreement during the war between the two countries, or for the postponement of its execution until peace returned. He then considered the provisions of clause 17 thus relied upon, and after a careful analysis of them rendered the opinion that clause 17 provided only for the "suspension of deliveries" and not "for suspension or postponement of the whole contract or of all the reciprocal duties under it." He then continued:

> "If this conclusion is reached the agreement cannot remain in force. It might perhaps be enough to say that it fell under the general rule expressed in *Esposito v. Bowden*, 7 E. & B. 763. One might rely also upon the provision in clause 18 for storing up the metal for the enemy hereafter, as to which see the observations of Lord Alvanley in *Furtado v. Rogers*, 3 Bos. & P. 199, 200. But there is a more serious objection in clause 3 of the second agreement: 'The sellers shall not so long as this agreement shall be in force sell any zinc concentrates to any person or persons firm or firms or corporation or corporations other than the buyers.' BY THIS CLAUSE THE BRITISH SUBJECT IS PREVENTED FROM USING HIS RESOURCES—AND HOW IMPORTANT THESE PARTICULAR RESOURCES ARE THE FACTS IN THE CASE SHOW—FOR THE BENEFIT OF HIS COUNTRY. THE ENEMY IS ALLOWED TO TIE HIS HANDS DURING THE PERIOD OF THE WAR. IF 'ANY ACT OR CONTRACT WHICH TENDS TO INCREASE THE RESOURCES OF THE ENEMY' IS UNLAWFUL, AS WAS SAID IN KERSHAW V. KELSEY, 100 MASS. 573, SIMILARLY ANY ACT OR CONTRACT WITH THE ENEMY WHICH TENDS TO DIMINISH THE RESOURCES OF ONE'S OWN COUNTRY MUST BE EQUALLY UNLAWFUL. If, therefore, one of the causes of suspension under clause 17 is war between Great Britain and Germany, the agreement would be an unlawful one. If, however, as seems reasonable, we are to construe the agreement *ut res magis valeat*

quam pereat, we shall not admit this as one of the causes of suspension; and in that case the parties have not provided for the contingency of this war, AND THE ORDINARY RULE PREVAILS. The agreement has become incapable of performance by reason of the outbreak of war and has been dissolved.

"I think that the judgment of Bray J. is right and that this appeal should be dismissed."

Lord Justice Pickford also read an opinion in which he agreed with the decision of Bray, J., that suspension of the agreement meant only suspension of deliveries and that the other terms of the contract remained in force. After pointing out that if the contract was not dissolved the plaintiffs could not sell to the defendants because that would be trading with the enemy, and they could not sell to anyone else because to do so would be a violation of the terms of the contract, he said:

"This seems to me to be a relation between a British subject and an alien enemy of a nature which is contrary to public policy, because it is calculated to be of detriment to the interests of this country and of assistance to the King's enemies: see per Lord Halsbury in *Janson v. Driefontein Consolidated Mines* (1902) A. C. 491. • • •

"It is also, if it be necessary to consider the matter, a relation of a commercial nature. I do not think that it is material that the agreement contained in clause 3 was valid at the time it was made. As soon as the war began the defendants became alien enemies and THE RELATION BETWEEN THEM AND THE PLAINTIFFS, BEFORE THAT PERFECTLY VALID, BECAME INVALID. It seems to me that the case is exactly within the words of Lord Tenterden in his work on Shipping, 5th ed., p. 427, quoted with approval by Willes J. when delivering the judgment of the Exchequer Chamber in *Esposito v. Bowden*, 7 E. & B. 784: 'If an agreement be made to do an act lawful at the time of such agreement, but afterwards, AND BEFORE THE PERFORMANCE OF THE ACT,

the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved.' It was argued before us that this only relates to the particular description of contract under consideration in that case, but I can see no difference in principle between that contract and any other, and I can see no difference in principle between an agreement to do an act by a British subject and an agreement imposing a restriction upon a British subject in favor of an alien enemy. This was the view taken by the Exchequer Chamber in *Esposito v. Bowden*, where Willes, J. a little later on the same page says: 'It may be added that the cases above put by Lord Tenterden cannot be treated as isolated propositions, but as instances of the general principle of law with which they are prefaced.' I do not in any way dissent from the conclusion that the existence of the unsuspended terms of the agreement would involve trading with the enemy, but in the view I take of the effect of clause 3 I have not thought it necessary to consider that matter in detail."

So in the case at bar to hold that *all* of the provisions of the contract were suspended automatically during the war, even though THE PARTIES DID NOT SO INTEND OR PROVIDE, and that hence the stock of the Leipzig company was beyond the reach of capture, would be to tie the hands of the Alien Property Custodian during the war. It would protect alien enemies' property during the war and enable alien enemies, upon the conclusion of peace, to regain possession of their property. The whole intent of the organization of the New York company, of the contract with the Leipzig company, the issuance of the stock of the New York company and the five-year trust of that stock, was to put a cloud upon the title of the alien-owned stock in the hope of preventing its seizure and its sale, if it should be seized, and meantime to retain control of the Botany Mills both during the war and after the war.

The whole scheme was an effort to diminish the effect of the war upon the commercial prosperity of the Leipzig company and the Leipzig company's stockholders, and hence the prosperity of the enemy country, which, as Lord Justice Eady said, "IT IS THE OBJECT OF THIS COUNTRY DURING THE WAR TO DESTROY".

To hold that the contract was not dissolved by the war, and that the right of the Leipzig company to the payment of money was merely suspended during the war, would be, as Lord Justice Eady said, "TO DEFEAT THE OBJECT OF THIS COUNTRY IN CRIPPLING THE COMMERCE OF THE ENEMY."

If it be argued that the stock of the New York company owned by the alien enemies could be seized and that that seizure would *indirectly* carry possession of the 14,900 shares, the conclusive answer is that the rights of the Alien Property Custodian following upon the dissolution of the contract on the outbreak of the war, cannot be defeated by the pretense that he may possibly or probably GET SOME OTHER RIGHTS IN SOME OTHER FORM—a clouded title to some five-year voting trust certificates. That is a matter for him to determine and he has determined to enforce his rights against the 14,900 shares DIRECTLY arising from the dissolution of the contract upon the outbreak of war.

II

The other English case dealing with contracts for the sale of goods and the effect of the outbreak of the war during such a contract, and involving questions of public policy and of suspension or abrogation, is *Bieber & Company, appellants, v. Rio Tinto Company, respondents*, decided in the Privy Council in January 1918.

Bieber and Company, appellants v. *Rio Tinto Company, Limited, respondents* (1918) Appeal Cases 260, in House of Lords.

There were three cases before the House of Lords as follows:

Ertel Bieber and Company, appellants and Rio Tinto Company, Limited, respondents.

Dynamit Actien-Gesellschaft (Formals Alfred Nobel Company), appellants and Rio Tinto Company, Limited, respondents.

Vereinigte Koenigs and Laura-Heutte Actien-Gesellschaft Fuerberybau and Huettenbetrieb, appellants and Rio Tinto Company, Limited, respondents.

There were three appeals from three orders of the Court of Appeal affirming judgments of the court below of Sankey, J. The three appellants were German companies carrying on business in Germany. The respondent Rio Tinto Company, Limited, was incorporated in England and owned large mines of cupreous sulphur ore in Spain.

The contracts were made before the war between England and Germany for the supply by the Rio Tinto Company of cupreous sulphur ore to the three German concerns. The question before the House of Lords was whether such contracts had been entirely abrogated and avoided by the outbreak of the war or whether they were merely suspended during the war. The facts were fully stated by Lord Dunedin in his judgment in the first and second cases.

The third case was admittedly covered by the second.

In the first case, by an agreement of January 27, 1910, the Rio Tinto Company agreed to sell to the appellant 1,280,000 tons, 15 per cent. more or less in buyers' option, of cupreous sulphur ore to be shipped from Huelva, Spain, between February 1, 1911, and November 30, 1914, and to be delivered ex ship in Rotterdam, Hamburg, Stettin, and/or other European Continental ports, except ports in Great Britain, France, Belgium, and Spain and Portugal; and by subsequent agreements the quantity of ore was increased by 165,000 and 50,000 tons. At the outbreak of the war on August 4, 1914, a substantial part of this ore still remained to be delivered.

By a further agreement of October 9, 1913, the respondents agreed to sell the appellants 2,200,000 tons, 15 per cent. more or less in buyers' option, of cupreous sulphur ore to be shipped from Huelva between February 1, 1915, and November 30, 1919, on the same terms as before.

EACH OF THOSE CONTRACTS CONTAINED A SUSPENSORY CLAUSE which provided that if owing to strikes, war or any other cause, the shipper should be prevented from shipping or delivering the ore, the obligation to ship and/or deliver "should be suspended during the continuance of the impediment and for a reasonable time afterwards".

In the second case the respondents by two agreements dated January 19, 1910, and January 28, 1913, agreed by their agents, to sell to the appellants in all some 80,000 or 90,000 tons of ore, to be delivered in Rotterdam. Those contracts were made in Germany and were in the German language.

EACH OF THE CONTRACTS CONTAINED A SUSPENSORY CLAUSE which provided that in all cases of *force majeure* (which included, among other things, war) preventing the respondents from loading or shipping or delivering the ore, then for the duration of the effects of such impediment the carrying out of the obligations undertaken by them should be suspended.

The German agreements in the second case differed from the English contracts in the first case only in matters of detail. The only substantial difference between the second case and the first case consisted in the fact that the agreements in the second case were in the German form.

On August 4, 1916, the respondent, Rio Tinto Company, pursuant to orders of Bray, J., commenced actions under the Legal Proceedings against Enemies Act, 1915, against the several appellants claiming declarations that the contracts were abrogated and avoided by the existence of a state of war between Great Britain and Germany on August 4, 1914, and that the respondents, Rio Tinto Company, were thereby released from any obligation to perform them.

The Court of primary jurisdiction (Sankey, J.) held, on the authority of *Zinc Corporation v. Hirsch* (1916) 1 K. B. 541, that the contracts had become illegal and were dissolved and made the declarations asked for, and his decision was affirmed by the Court of Appeal.

The case was argued in the House of Lords in 1917, on November 23, 26, 27, 29.

The appellants argued that only those contracts are dissolved which IN FACT INVOLVE trading or intercourse with the enemy, and if the parties "by their contract provided that in the event of war there shall be no communication between them the contract is not determined"; that that is what the parties had done and that they had deferred the execution of the contract until the impediment was removed and for a reasonable time thereafter. The appellants sought to distinguish the decision in *Zinc Corporation v. Hirsch* (1916) 1 K. B. 541 on the ground that the respondents in the Rio Tinto case were under no restrictions as to dealing with the ore during the period of suspension. Counsel for the appellant tried to distinguish Lord Stowell's decision in *The Hoop* (1799), 1 C. Rob. 196, 200, 201; Lord Kenyon's decision in *Potts v. Bell* (1800), 8 T. R. 548, 561; *Furtado v. Rogers* (1802), 3 Bos. & P. 191, 198, and *Esposito v. Bowden* (1857), 7 E. & B. 763.

Counsel for the appellant also argued that a contract is illegal only in so far as it affords "assistance to the enemy during the war"; and that it is "no objection to the contract THAT IT MAY PROFIT THE ENEMY AFTER PEACE IS RESTORED". Citing *Daimler Co. v. Continental Tyre and Rubber Co.* (1916), 2 A. C. 307, 347.

Counsel for the appellant further argued that from the nature of the case "it cannot be a present assistance to the enemy that after the war he shall have a supply of material which he cannot use to the detriment of this country". Citing *Tingley v. Miller* (1917), 2 Ch. 144, 157, 160. He argued that the question of public policy did not enter into the *Rio Tinto case.*

As to the second case: The appellants argued that the respondents must prove their contract "illegal according to German law", and that before the contracts could be declared contrary to public policy it was necessary to ascertain "the public policy of the country to which the parties are subject", which seems to be a rather fishy argument. The chief argument was made by Compton, K. C.

If it meant anything, it meant that merely because the contract was in German, it was necessary to ascertain the public policy of the country TO WHICH THE PARTIES WERE SUBJECT, coolly ignoring the fact that one of the parties to the contract was not a German and was not "subject" to Germany.

Counsel for the respondents argued:

> "It is no answer to say that these contracts must be construed according to German law. The English Courts will not enforce a German contract which is contrary to the policy of this country, and by the law of this country any contract which involves either intercourse with the enemy or advantage to the enemy is dissolved by the outbreak of war: *Halsey v. Lowenfeld* (1916), 2 K. B. 707, 716. The respondents are prepared, if necessary, to contend that all executory contracts of a commercial nature are avoided by the war, though not involving communication with the enemy during the war. The existence of a commercial contract between a foreigner and a British subject is incompatible with a state of war existing between the two countries. It is only by the grace of the Crown that an enemy either holds property in the realm or can claim debts due to him. An alien enemy is outside the pale of English law, and, except by the grace of the Sovereign, has no rights within the law. All his civil rights cease. It is enough to say that all commercial contracts which are for the benefit of the enemy are avoided and that these contracts fall within this category".

The opinions of the House of Lords were rendered January 25, 1918. The first opinion was by Lord Dunedin, who among other things said:

> "My Lords, the proposition of law on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts

which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or any one voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial'. As to this I agree with the judgment of the Court of Appeal in the case of *Robson* v. *Premier Oil and Pipe Line Co.* (1915), 2 Ch. 124, 136, where Pickford, L. J., delivering the judgment of the Court, Lord Cozens-Hardy, M. R., himself and Warrington L. J., said: 'The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject WHICH MIGHT RESULT IN DETRIMENT TO THIS COUNTRY OR ADVANTAGE TO THE ENEMY IS PERMISSIBLE because it cannot be brought within the definition of a commercial transaction'.

"That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt. There are many cases, but what may be termed the landmarks of the law on the subject will be found in the judgment of Lord Stowell, in Admiralty, in the case of *The Hoop,* 1 C. Rob. 196 in the year 1799; in Lord Alvanley's judgment in 1802 in *Furtado v. Rogers* 3 Bos. & P. 191; and still more explicitly in the judgment of the Queen's Bench in 1857 in *Esposito v. Bowden* 7 E. & B. 763, where the members of the Court were Jervis, C. J., Pollack, C. B., Alderson B., and Cresswell, Crowder and Willes JJ. In recent decisions the proposition has been recognized in many cases. I would refer especially to the very learned and careful inquiry into the subject generally by Lord Reading, C. J., in the case of *Porter v. Freudenberg,* (1915) 1 K. B. 857, 866. And in your Lordships' House the proposition was at the root of the judgment in the case of

British and Foreign Marine Insurance Co. v. Sanday & Co., (1916) 1 A. C. 650 and was directly applied in the case decided this morning where the partnership was held dissolved by the war (*Hugh Stevenson & Sons v. Aktiengesellschaft fur Cartonnagen-Industrie, Ante,* p. 239)."

Lord Dunedin then considered the decision of *Esposito v. Bowden,* 7 E. & B. 763 and *Janson v. Driefontein Consolidated Mines,* (1902) A. C. 484, 493, and said:

"Now taking the legal proposition alone, and supposing that the contracts in question had contained no other clauses than those which I have set forth as to dates of delivery, it would at once follow that the first contract so far as unimplemented, is avoided; for the dates of delivery under it, so far as not performed, extended from August, 1914, to February, 1915, during which time a state of war has prevailed. It is also obvious that all dates of delivery under the second contract from February 1, 1915, up to the present time have been rendered illegal by the war. The only matter left would be this. The defendants' counsel argued that as it was possible that the war would end before November 30, 1919, there might still be a duty to deliver such instalments as are appropriate to the remanent period from the end of the war to November, 1919. BUT THAT WOULD BE TO TURN A CONTRACT FOR TWO MILLION TONS INTO A CONTRACT FOR FAR LESS. To meet this the defendants said that each monthly shipment was essentially a separate contract. The answer is to be found in what was said by Lord Selborne in the case of *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App. Cas. 434, 439. That was the case of a contract for 5000 steel blooms with delivery 1000 tons monthly commencing on January next. His Lordship said the subsidiary terms as to time of delivery and as to payment did not split up the contract into as many contracts as

there should be deliveries, but there was one contract for purchase of that quantity of iron".

He then passed to the defense of the action based on the clause practically identical in both contracts regarding suspension, and to the argument of the defendants that the effect of that clause was to remove from the contract all necessity for the "forbidden thing" (intercourse during the war), and stated that the recent decision in *Esposito* v. *Bowden* was therefore gone and that there was no reason why the contract to deliver "after the war should not be good". As to this Lord Dunedin held:

> "My Lords, I do not think it can be gainsaid that, *Esposito v. Bowden* (7 E. & B. 763) being, as I have already said, good law, then, IF THERE ARE DUTIES WHICH REMAIN UNAFFECTED BY THE SUSPENSORY CLAUSE, AND THESE DUTIES INVOLVE INTERCOURSE, THE CONTRACT MUST BE AVOIDED. In so far as the *Zinc Corporation Case* ((1916) 1 K.B. 541) laid down this proposition it was, in my opinion, right; and it is useless to examine the clauses in that case. It is necessary, however, to examine what the duties are under this contract. In order to make clause 12 intelligible it is necessary first to quote clause 2, which is in these terms: '2. One-fifth of the above 2,200,000 tons, viz., 440,000 tons, 15 per cent. more or less, is to be shipped in each year, during the period between 1st February and 30th November, and spread as nearly as sellers can arrange uniformly over this period. The sizes of cargoes for Rotterdam, Hamburg and Stettin shall be in sellers' discretion, but for other ports sellers shall arrange as far as possible for such reasonably sized cargoes, but not exceeding 3,000 tons, as buyers desire. About one-half of the ore is to be lumps and about one-half is to be fines, viz., ore which has passed through a half-inch square mesh screen'. Clause 12, so far as material, is as follows: 'The buyers are to declare in writing not later than 1st January of each year the total quantity of fines and lumps

separately which they desire delivered during that year, and what quantity of each size is to be delivered at each port'.

"The defendants contend that there is here no duty, but a mere option on their part. If they do not declare, all that ensues is that the ore falls to be divided equally between fines and lumps. I do not agree with the defendants' view. It is not alone the proportion as between fines and lumps but the total quantity that has to be determined, i.e., the decision as to the 15 per cent. more or less. Moreover, evidence has been given, which there is no reason to disbelieve, by which it is shown that from the sellers' point of view it is necessary to have these two matters fixed in order to settle the programme for working the mine during the ensuing year. And this yearly duty seems to me quite independent of delivery. I am therefore prepared to agree with the Court of Appeal on this ground of judgment. As regards clauses 18 and 19, I confess I am doubtful. Clause 18 is an arbitration clause. Now, though I agree with the learned judge who says that ARBITRATION CANNOT BE CONDUCTED WITHOUT INTERCOURSE, it seems to me that arbitration is not a necessary, nor indeed a usual, part of the performance at a time when *ex hypothesi* all deliveries under the contract are suspended. There is nothing for the time being to arbitrate about. So also as regards clause 19. This is a very special matter, providing, in the event of a Mr. Julius Ertel ceasing to be a member of the firm of Ertel Bieber & Co., that his place in active administration should be filled in a certain way. But Mr. Julius Ertel has not, so far as known, ceased to be a member of the firm, and active administration on the afore-mentioned hypothesis of suspended deliveries is at a standstill.

"My Lords, while the construction which I put on clause 12 affords, as I have said, sufficient ground to enable me to say that the judgment of

the Court of Appeal should be affirmed, IT IS, I THINK, DESIRABLE THAT OUR JUDGMENT SHOULD BE ALSO BASED ON RATHER BROADER GROUNDS. It is the more necessary to express an opinion on this point, because, as I shall hereafter have to say, I think the argument on clause 12 fails to be applicable in the two other cases which your Lordships will presently consider.

"My Lords, I confess I cannot read clause 15 without coming to the conclusion that, although war is mentioned *eo nomine* in that clause, it is not war between Great Britain and Germany, with the legal consequences thereon ensuing, that is envisaged, but war between other Powers, of whom Great Britain or Germany may be one, and which acts as a practical impediment *via facti* in stopping the possibility of delivery. But it is not necessary, in my view, to decide this question, for the simple reason that the respondents seem to me to be involved in a dilemma. Either the war which is to suspend delivery does not include a war between Great Britain and Germany, in which case the clause does not apply, or if it does mean such a war, with the legal consequences following thereon, THEN, IN MY VIEW, THE CLAUSE IS VOID AS AGAINST PUBLIC POLICY. I apprehend that in saying this I am not inventing a new head of public policy. I respectfully subscribe to the remarks made on this subject by the Earl of Halsbury in *Janson v. Driefontein Consolidated Mines* (1902, A. C. 484, 491). I take my view of what is against public policy from what has been said in a series of cases which have certainly become the law of England.

"Let me revert to the leading cases which I have already cited. The case of *The Hoop*, (1 C. Rob. 196) was a case where the goods from an enemy country, which had been consigned to British subjects and under contract became his property, were confiscated by capture by a British ship. The contract with the enemy subject by which the property

in the goods passed was made pendente bello. The ground of judgment was that all trading with the enemy is unlawful at common law as against public policy. Why? Not because of the terms of the particular contract, but because contract in general might enhance the resources of the enemy or cripple those of the subjects of the King.

"The case of *Furtado v. Rogers* (3 Bos. & P. 191, 198, 199) advanced the application of the rule a step further. Here the contract, which was one of insurance to indemnify for losses by war, was entered into when the countries were at peace. It was held that to allow such a contract, if war meant war between the insurer's country and this country, was unlawful. The ground on which this is put is very important. 'We are all of opinion', said Lord Alvanley, 'that on the principles of the English law it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by Act of Parliament, he is not bound by his contract. This was expressly laid down in *Brewster* v. *Kitchell*, (1697) 1 Salk. 198."

After considering other authorities and *Esposito* v. *Bowden*, Lord Dunedin laid down the following rules:

"From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1.) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2.) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law. I do not quote the recent

dicta of learned judges in the cases already cited of *Porter* (1915) 1 K. B. 857, *Robson* (1915) 2 Ch. 124, and *Zinc Corporation* (1916) 1 K. B. 541, because, although they are to the same effect and I agree with them, the recent cases are in one sense submitted in this case to the review of your Lordships' House.

"Let me now apply this rule to clause 15 on the hypothesis that it does suspend delivery during the war. But for it the contract would immediately end, by it the contract is kept alive, and that not for the purpose of making good rights already accrued, but for the purpose of securing rights in the future by the maintenance of the commercial relation in the present. It hampers the trade of the British subject, and through him the resources of the kingdom. For he cannot, in view of the certainly impending liability to deliver (for the war cannot last for ever), have a free hand as he otherwise would. He must either keep a certain large stock undisposed of, and thus unavailable for the needs of the kingdom, or, if he sells the whole of the present stock, he cannot sell forward, as he would be able to do if he had not the large demand under the contract impending. It increases the resources of the enemy, for if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stock, but it represents a present value which may be realized by means of assignation to neutral countries.

"For these reasons I come to the conclusion that clause 15 is void as against public policy and cannot receive effect. Without clause 15 there is an obvious necessity for intercourse, and the contract is therefore avoided as a whole. I am of opinion that the appeal should be dismissed with costs."

So in the case at bar, to hold that the contract in question prevented the seizure of the stock belonging to alien

enemies, would tend "to increase the resources of the enemy" and would cripple the resources of American citizens. If the contract were to be upheld, if it were to be kept alive, for the purpose of securing the rights of the Leipzig company in the future, it would hamper the rights of the Alien Property Custodian. It would increase the resources of the enemy by destroying the right of seizure by the Alien Property Custodian of the enemy-owned stock, leaving open the possible retention of the control of the New York company which is burdened with a five-year voting trust which will outlast the war.

Lord Atkinson also delivered a special opinion in the *Rio Tinto* case (1918) A. C. 275-280. From his opinion it appears that anything that MIGHT involve "communication" is illegal. Referring to the decision of Sankey J. and the Lords Justices of the Court of Appeal, Lord Atkinson said:

> "I agree with them in thinking that the terms of this second agreement required that, in order to carry out the commercial transaction which was its subject-matter, FREQUENT COMMUNICATIONS touching its details should necessarily take place between the appellants and respondents, and, if that be so, it is well established by many authorities that those COMMUNICATIONS would, under the circumstances, be illegal, and would vitiate and make void the contract that involved and required them. It is only necessary to refer to *The Hoop*, 1 C. Rob. 196, *Potts v. Bell*, 8 T. R. 548, *Esposito v. Bowden*, 7 E. & B. 763, and *Janson v. Driefontein Consolidated Mines* (1902), A. C. 484, as authorities on the point.
>
> "THE ILLEGALITY OF THESE COMMUNICATIONS DOES NOT IN THE SLIGHTEST DEGREE DEPEND ON THE TRIVIALITY OF THE BUSINESS DETAILS COMMUNICATED. The danger to the State involved in them lies probably to the greater extent in this, that, if permitted, they would afford easy opportunities for the communication of information most useful to the hostile belligerent State, and therefore injurious to the

State of which the person making the COMMUNICATION was a subject. In *Potts* v. *Bell*, 8 T. R. 548, 555, Sir John Nicholl, in an argument approved of, and indeed apparently adopted, by Lord Kenyon and the Court, put this objection most forcibly. And the recent decisions in the cases of *The Panariellos* (1915), 138 L. T. Journ. 484, and *Robson* v. *Premier Oil and Pipe Line Co.* (1915), 2 Ch. 124, following the decisions of Sir William Scott in *The Hoop*, 1 C. Rob. 196, and in *The Cosmopolite* (1801), 4 C. Rob. 8, show that the prohibition, at common law, extended to intercourse of all kinds which could tend to the detriment of this country or the advantage of the enemy.

"Owing to some observations which were made in argument, it is, I think, well to point out that the illegality of any transaction as amounting to trading with the enemy does not at all depend upon whether it is profitable, either to the British citizen or to the enemy subject who engages in it, or the contrary. Trading with the subject of an enemy State, or with a person resident in that State, IS ASSUMED TO BE BENEFICIAL TO THE ENEMY STATE. IT HELPS THE ENEMY'S TRADE AND COMMERCE, AND SO FAR DEFEATS ONE OF THE OBJECTS OF THIS COUNTRY IN GOING TO WAR, WHICH IS TO CRIPPLE THAT COMMERCE, IN ORDER TO FORCE THE ENEMY TO COME TO PEACE. It may be that the trading would benefit this country as well; that, however, is not for the individual trader to decide. It is for the State to decide, and the State can, if it so desires, grant licenses to trade to particular persons or for particular commodities and so secure that benefit. In *Ex parte Baglehole* (1812), 18 Ves. 525, 529, Lord Eldon said: 'Though it might be a very beneficial act in a subject of this country to purchase corn in France and send it to this country at the present period, yet, if he was there without license to trade, to reside and trade, such commerce would be clearly illegal.' The statement was, I presume, based on

this ground, that, though beneficial to this country, it would also, presumably, be beneficial to the then enemy, France, and, because of this, necessarily detrimental to the higher interests of England. Lord Alvanley, in the well-known passage of his judgment in *Furtado v. Rogers*, 3 Bos. & P. 191, 198, 199, lays it down 'that on the principles of the English law it is not competent for any subject to enter into a contract to do any thing which may be detrimental to the interest of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament.' Lord Alvanley was no doubt in that case dealing with the case of a policy of insurance, but he laid down this principle in general terms, and his decision was approved of without qualification in *Janson v. Driefontein Consolidated Mines* (1902), A. C. 484, 506. Lord Alvanley further says: 'But it is said that the action' (i. e., the action to recover on the policy) 'is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. THE ENEMY HOWEVER IS VERY LITTLE INJURED BY CAPTURES FOR WHICH HE IS SURE AT SOME PERIOD OR OTHER TO BE REPAID BY THE UNDERWRITER.' This remark applies to the suspensory clause in the special agreement.

"I think, however, that in this case a wider and equally important question arises for determination. Scrutton L. J. refers, at some length, to it in his judgment. It is this, whether the outbreak of the war does not by itself make illegal the contract contained in the 15th clause of the second agreement. That clause provides that if the respondents should be prevented, owing to strikes, war, or any other cause over which they have no control, from shipping from Huelva, or delivering to the appellants the ore purchased, the obligation of the respondents to ship and deliver the same during the continuance of the impediment and for a reasonable time thereafter to allow the respondents to re-

sume shipments and deliveries should be suspended. There is a corresponding provision that should war or any other cause over which the appellants or their clients have no control prevent them from receiving the ore, the obligation to receive under the contract should be reduced in proportion or suspended during the continuance of the impediment and a reasonable time thereafter to allow the appellants time to recommence receipts. It will be observed that this clause only deals with the shipment, delivery, and receipt of the ore, and save so far as the suspension of those things may affect the other clauses of the contract leaves those latter untouched. Many of the obligations these clauses impose still rest upon the parties, and it is because of this result that I concur in the conclusion at which the Court of Appeal have arrived. As regards this 15th clause, it is necessary in the first place to ascertain what is its precise meaning. Do the words 'war or any other cause over which the sellers have no control' cover and embrace the present war between Great Britain and Germany? IF THEY DO NOT EMBRACE IT THE AGREEMENT IS CLEARLY ILLEGAL AND VOID, INASMUCH AS IT WOULD BIND A BRITISH SUBJECT TO DELIVER GOODS TO AN ALIEN ENEMY IRRESPECTIVE OF THE EXISTENCE OF THAT WAR JUST AS IF THE TWO COUNTRIES WERE AT PEACE. In my view the clause clearly covers the existing war between this country and Germany though it is not confined to it. Next, does the prevention by war mean not only prevention by physical warlike operations, such as capture and blockade, for instance, but also prevention by the legal principles applicable to trading during a state of war—the prohibition of English subjects from engaging in commercial intercourse with alien enemies? I see no reason whatever for confining these words to the first of the results of a state of war. I think they include both results. Next, what is the meaning of the words 'the obligation to deliver shall be sus-

pended'? Do they mean that the entire amount of ore contracted to be delivered, 2,200,000 tons, 15 per cent. more or less, are to be delivered as soon as the war shall have ended or within a reasonable time thereafter, or do they mean that the respondents are relieved for ever from the obligation to deliver each year while the war lasts the 440,000 appropriate to that year, so that at the end of the war they shall only be obliged to deliver the latter amount for every year between the termination of the war and November 30, 1919? If the first, the agreement purports to secure, as far as an agreement of the kind with a company whose solvency has not been impeached can secure, great and immediate benefits to the appellants, and through them for their country. IT WILL HAVE SECURED FOR THEM THE CERTAINTY THAT THEIR TRADE AND COMMERCE WITH THE RESPONDENTS WILL BE RESUMED IMMEDIATELY ON THE TERMINATION OF THE WAR, that a vast stock of ore will then or within a reasonable time thereafter be available for them, ready for delivery to them or their order, ENABLING THEM DURING THE WAR TO MAKE FORWARD CONTRACTS WITH THEIR OWN CUSTOMERS, AND TO RAISE MONEY ON THE SECURITY OF THIS AGREEMENT, AND THUS TO KEEP ALIVE TO A CONSIDERABLE EXTENT DURING THE WAR THEIR TRADE AND COMMERCE TO THEIR OWN GAIN, with the resulting benefit to their country, and at the same time work to the detriment of England in that it would prevent this vast mass of ore being made available for English manufacture. Well, if it mean the second, benefits the same in kind, though less in degree, would be accured to the appellants and their country, and the same injury in kind, though less in degree, inflicted on the respondents and their country. If this clause 15 were deleted from the agreement it could not, I think, be contended for a moment that the contract was not illegal and void. I cannot think that a

clause which does not deprive the appellants of the full enjoyment of all benefits of the contract, but merely postpones that enjoyment for an uncertain time, leaving it ultimately certain and secure, can change the nature of the contract and make it legal and binding. On this ground, therefore, as well as that I have first dealt with, I think this agreement has by the outbreak of the war with this country and Germany become illegal and void, that the decision of the Court of Appeal was right and should be upheld, and this appeal be dismissed with costs."

The contract in the case at bar binds a New York company, a citizen of the United States, to pay money to an alien enemy, "irrespective of the existence of the war just as if the two countries were at peace." That tends to increase the resources of the alien enemy. It does not EVEN ON ITS FACE pretend to be suspended during the war. Although obviously made in contemplation of the war, and obviously a clumsy effort to defeat the right of capture of the United States on the outbreak of war, it yet contained no provision that its terms or any of them should be suspended during the war. Hence it contemplated things to be done *during the war*, and therefore became illegal on the outbreak of war.

Lord Waddington also delivered a separate opinion (1918) Appeal Cases, 280-284. He held that if the suspensory clause be construed as covering or providing against the effects of war between England and Germany, then it was void as contravening the well-known rule of public policy. He said:

"It is not permissible by English law for a subject of the Crown to contract with a foreigner that in case of war between this country and the State of which the foreigner is a subject, the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise suffer by reason of the war or of anything done in the prosecution of the war. This is the principle which underlies Lord Alvanley's judgment in

Furtado v. Rogers, 3 Bos. & P. 191. It is true that in that case the actual decision turned on the true construction of the contract, which was for insurance against capture at sea. It was held that such a contract impliedly excluded capture by His Majesty's naval forces. But the really important point is the reason for this conclusion. It was because otherwise the contract would have been altogether void as against the public policy of the realm. In *Janson v. Driefontein Consolidated Mines* (1902), A. C. 484, the same principle is recognized, though the decision itself turned on different considerations. An attempt was there made to extend the principle to a seizure of goods of the insured by his own Government during peace but at a time when war was anticipated, but this attempt failed."

Lord Waddington held that the respondents were therefore bound to deliver to the appellants in the year 1914 the undelivered portion of ore contracted to be sold, and said: "The effect of the war on this liability was clearly to abrogate it altogether. It could not be performed without trading with the enemy. The war made it illegal. The case of *Esposito v. Bowden* is clearly in point and the decision appealed from is right." (1918) Appeal Cases, 282.

Passing to the second contract, Lord Waddington held as follows:

> "In the view I take of the suspensory clauses it is unnecessary to consider this point. I prefer to rest my opinion on the broader ground that the suspensory clauses cannot, for the reasons I have given, apply to the present war, and upon the consequences which necessarily follow, if they do not apply."

Lord Sumner also delivered a separate opinion (1918) A. C. 284-291. Among other things he said:

> "The rule of law which forbids a British subject to trade with the King's enemies is very ancient. Its effect upon trading contracts which, like the present, are executory on both sides was already

well settled by the middle of the last century. *Esposito v. Bowden* (7 E. & B. 763) finally answered the last of the questions which had been raised down to that time. The Court of Queen's Bench held that the charter was only dissolved on the outbreak of war if it could not possibly be performed without trading with the enemy, and in supporting this decision in the Court of Exchequer Chamber, Mr. Manisty argued that the mere declaration of war did not rescind the executory contract in question; 'it only suspends it, and renders it illegal where it cannot be performed in any legal manner'. The Court of Exchequer Chamber first of all made it plain that the question was a general one, not dependent on the mere possibilities of the particular case, and that the occlusion of Odessa to Englishmen generally, by force of law, for an indefinite and presumably protracted time, could not be done away with by suggesting some possibility of a British ship loading cargo in that enemy port while somehow or other avoiding all contact with any enemy. Secondly, the Court decided in express terms that illegality does not suspend; it dissolves. What the law forbids is impossible of performance to those who owe obedience to that law, and this higher public obligation discharges any private obligation to the contrary.

"BEFORE 1914 I DO NOT THINK THAT THE THEORY UPON WHICH THIS DISSOLUTION IS HELD TO OCCUR HAD BEEN THE SUBJECT OF ACTUAL DECISION. The common law rule is much older than the development of overseas commerce, and during last century the practical question raised was 'how does the rule affect commercial contracts', and not 'how is that effect to be stated and justified in terms of general jurisprudence'. It occurred, however, within recent years to some ingenious mind, OBVIOUSLY WITH THE DESIRE TO PREFER PRIVATE COMMERCE TO PUBLIC PRINCIPLE, that a clause of suspension might secure to particular contracts that

continued existence during war which the Exchequer Chamber had denied generally. To negotiate with an enemy towards the end of a war for the conclusion of a contract to sell and deliver goods as soon as peace should be signed would be a crime, but to stand bound to do so by a contractual tie throughout the war might possibly be lawful, if only the contract was concluded before the war with a provident eye to the possibility of its occurrence. Hence the disputes of which the present appeal is a type. Does a suspensory clause oust the application of the general rule?"

Lord Sumner then stated the following principles regarding public policy:

"My Lords, public policy, though a clue to the principle involved, is not in itself the key to the difficulty. The rule as to the dissolution of trading contracts on the outbreak of war, when they are executory on both sides, is said to exist for the purpose of assisting to cripple the enemy's commerce and of closing an avenue to illicit and traitorous correspondence. These are, however, the practical advantages of the rule, not its basis in theory. Courts of law are not at liberty to apply the rule and dissolve a contract merely because they think its continuance disadvantageous to this country's belligerent policy. I think that public policy is a separate ground for deciding this particular case, but so far as trading with the enemy goes, I wish to keep within what I conceive to be implicit in the old decisions upon the question.

"My Lords, if upon public grounds on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves? The prohibition, which arises at common law on the outbreak

of war, has for this purpose the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the contract is said to be only suspended, or a Court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war. An appearance of authority to the contrary is sometimes found to be in truth a misreading of the language of a decision. Thus Lord Halsbury's use of the word 'affected' in *Janson v. Driefontein Consolidated Mines* (1902, A. C. 484, 493) is due to the fact that, by consent, the case had been tried as if the then war had terminated. The question was one of a cause of action, which had accrued one day before the outbreak of war and thereupon had been suspended as to the remedy only. Of course, if the war was treated as over, neither contract nor remedy was 'affected'. The policy was not an executory contract after war broke out so far as concerned the gold seized at Vereeniging at all. There can be no doubt that the matter must have been considered. To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The Courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of Willes J. in *Esposito's Case* (7 E. & B. 763, 792): 'In all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without wait-

ing for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well-known rule, to meet cases of ordinary occurrence'. To his mind I think it is clear that the RULE WAS ONE MADE TO PROVIDE CERTAINTY AT THE OUTBREAK OF WAR, WHERE IN ITSELF EVERYTHING IS UNCERTAIN; THAT IT WAS ONE MADE TO APPLY GENERALLY, although taking its form from the needs of ordinary cases; and that, for the purpose of applying it, the case must be looked at as things stood when war broke out, and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action.

"In the abstract discharge of a contract by reason of the outbreak of war between the countries to which the parties respectively belong should be effected simply by operation of law independently of their arrangements. THE RULE SETS THE PUBLIC WELFARE ABOVE PRIVATE BARGAIN. It does so for the safety of the State in the twofold aspect of enhancing the nation's resources, and crippling those of the enemy. To hold that the parties may be allowed to make their own arrangements for attaining these ends and to set their private judgment, not untinged by considerations of their future interest, above the prescriptions of the public law would be anomalous. To say that for the purpose of preventing such intercourse the law generally determines stipulations which involve commercial intercourse between enemies, but when the parties have agreed not to hold any such intercourse is content to leave it to them, would indeed be rash. True, there is the criminal law against holding commercial intercourse with the enemy, but the offence is one not always easy to detect. In a matter of national safety the State cannot surely rely on the bare integrity and good

faith of persons whose commercial interest may so strongly conflict with their public duty."

Lord Sumner then considered (1918) A.C. 288, the decisions in *Esposito v. Bowden,* and the decision by Justice Story in *The Rapid,* (1812, 1 Gall. 295, 309), and then passed to a consideration of the decision of Chancellor Kent in *Griswold v. Waddington* (1819, 16 Johnson, Sup. Ct. New York, 438, 489) and stated that each instalment could NOT have been treated as if it were the subject of a separate contract, and that "instalments, which in point of date might fall to be delivered after the conclusion of peace", cannot be severed from the rest.

So in the case at bar. It cannot be argued that the war might have been over before the first instalment was payable. The plaintiff cannot have the benefit of any such presumption. The rule is that the whole contract, so far as it is mutually executory, is dissolved. The court will not commit the absurdity of making the assumption that war would be over before the first payment was to be made.

As to that Lord Sumner said:

> "The whole contract so far as it is mutually executory is dissolved. Again, the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace is not an argument in favour of substituting suspension by agreement for discharge by operation of law. Whether it sounds in debt or in damages such a cause of action implies a present obligation to pay simultaneous with its coming into existence. Suspension of the remedy implies no continuance of the contract during the war, but only a recognition of its existence before the war as the basis or origin of a right, which, when it has accrued, is a chose in action, a form of property.
>
> "My Lords, in my opinion discharge by operation of law upon the outbreak of war operates upon trading contracts as a class by reason of their common characteristic of international intercourse, and is

not prevented by special stipulation between the parties. It is not necessary for present purposes to define the term 'trading' or the word 'enemy'. The class affected is not such contracts as contemplate a continuance of trading during war, but trading contracts as such, which are in being as mutually executory contracts at the outbreak of war, AND WOULD IN ORDINARY COURSE AND CIRCUMSTANCES IMPORT COMMERCIAL INTERCOURSE. 'War', says Lord Lindley in *Janson's Case* (1902, A. C. 509) "• • • prohibits all trading with the enemy except with the Royal license, and dissolves all contracts which involve such trading'. As the present case is one of such executory trading, I think the rule that such contracts are discharged upon the outbreak of war must apply".

Lord Sumner then dealt with an independent ground as follows,—a ground which seems to have a bearing on the facts in the case at bar. He said:

"There is another and independent ground on which this appeal may be disposed of. 'We are all of opinion', says Lord Alvanley, C. J. in *Furtado v. Rogers*, speaking of a commercial contract operating after the outbreak of war though made before it, 'that on the principles of the English law it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of his own country'. If the principle of this decision be applied to the construction of these contracts, the suspensory clauses must be read as if they contained the words 'an Anglo-German war always excepted'; in that case, under *Esposito v. Bowden*, the contracts became discharged. If on the other hand the above passage be applied and the suspensory clauses be read as the appellants contend, then in my opinion the contracts never were valid. THEY WERE VOID FROM THE OUTSET ON GROUNDS OF PUBLIC POLICY. It is incidental to the conduct of

war that the Sovereign should be free to bring pressure to bear on the enemy by crippling his commerce and exhausting his resources; it is incidental to the conduct of war that the resources of the Sovereign's subjects should be free to be employed lawfully in preserving and extending the resources of the realm. IT IS FURTHER IMPORTANT TO ITS CONDUCT THAT THERE SHOULD BE NO CLOG ON THE SOVEREIGN'S POWER TO IMPOSE HIS WILL ON THE ENEMY THROUGH FEAR OF THE INCLUSION OF UNFAVORABLE ECONOMIC CONDITIONS IN ANY TREATY OF PEACE. The present contract involves large sums. Your Lordships were told that its future performance represents 10,000,000l. to the buyers, and it well may be so. Multiply these contracts, say, hundredfold—no extravagant hypothesis—and what is the result on the conduct of the war? If these suspensory clauses are valid, the enemy knows three things: the first, that he may expend certain of his material resources without stint, for his right to replenish them in enormous quantities is assured AT OR SHORTLY AFTER THE CONCLUSION OF PEACE; the second, that the present employment of these raw materials as British resources during the war whether in the way of commerce or in the actual supply of combatant needs, is hampered by the existence of huge future commitments, performable at an uncertain and perhaps not distant date; THE THIRD, THAT HE MAY REST ASSURED THAT THE IMPOSITION OF COMMERCIAL DISADVANTAGES IN THE TREATY OF PEACE IS PRO TANTO NEUTRALIZED, AND THAT MILITARY RESISTANCE MAY BE PROLONGED IN PROPORTION. I think it plain, as it was thought by the Courts below, that such suspensive clauses as are in question here tend to defeat the successful conduct of the war on His Majesty's part, and are therefore contrary to public policy and render the contracts void.

"My Lords, I do not forget how limited is the extent to which Courts of law can guide their de-

cisions by their views of public policy, nor am I insensible to the fact that in giving circumstances, perhaps in circumstances as they are now, more profits may be lost by British than by enemy subjects, if all mutually executory trading contracts are discharged on the outbreak of war. How this may be, in my opinion a Court of law is not competent to inquire or decide. Is it to be guided by the sums involved, the profits in prospect, or the economic value of the particular commodity to the general commerce and industry of the nation? Is it to call upon private parties to give evidence of the existence of contracts (probably jealously concealed) to which others are parties and they are strangers? IT IS FOR THE EXECUTIVE TO INVESTIGATE AND FOR THE LEGISLATURE TO PROVIDE FOR SUCH POSSIBILITIES. ALL THAT JUDGES CAN DO IS TO ADHERE TO ESTABLISHED RULES, TO ASCERTAIN THEIR LOGICAL FOUNDATIONS, AND TO APPLY THEM IMPARTIALLY TO DISPUTED CASES."

If the contract of February 20, 1917 was not abrogated on the outbreak of the war, then it either involved and required present trading with and the payment of a large sum of money to the enemy or was suspended during the war. If the parties to the contract had put in a suspensory clause, they would have done a perfectly logical thing. But they did not. They thought they were accomplishing the same thing by putting the five years voting trust upon the stock of the New York company, thus clouding its title and preventing a sale. But if they had put in a suspensory clause, the contract would have been void from the outset on the grounds of public policy, under the authority of the *Rio Tinto case.*

In the second action, *Dynamit Actien-Gesellschaft v. Rio Tinto Company*, the defendant showed that the contract was a contract made in Germany, in the German language, by a German agent of the English principal. There was no proof of what the German law was. It was held by Lord Dunedin that the fact of the contract being a German

contract had no bearing upon the question. He assumed that the question of interpretation was settled in accordance with the German law, and then said that if the contract continued to be carried out according to its terms there would necessarily be commercial intercourse. "But the German courts could decide that the suspensory clause stopped such intercourse, and either did or did not leave other duties involving intercourse. If they decided it did not, then they might decide that the existence of the suspensory clause and the continuance of the contract after the war were not against German public policy. But they could not determine in such a way as to bind an Englishman in an English Court that such a clause with these effects was not against English public policy and therefore binding on an English subject."

The decision of Lord Atkinson (1918) A. C. 295-301 comes to the same conclusion as the opinion of Lord Dunedin, but it contains some excellent discussions of public policy.

Lord Atkinson said:

> "I think the above cited authorities clearly establish that, even if it were so, a British subject, once war breaks out, is bound not to trade with Great Britain's German enemies, that contracts binding him to do so become as to him illegal and void, and that the Courts of this country will not enforce them. The rights and liabilities of British subjects depend in these matters for their legality upon what British laws and British policy demand, and not upon what the law or public policy of Germany prescribes in reference to commercial contracts made with its subjects".

Lord Waddington laid down the following excellent rules as to public policy:

> "Whenever the Courts of this country are called upon to decide as to the rights and liabilities of the

parties to a contract, the effect on such contract of the public policy of this country must necessarily be a relevant consideration. Every legal decision of our Courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise. As has been often said, private international law is really a branch of municipal law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored. If the policy of our law renders it unlawful for a subject of the Crown to contract with a foreigner that if war break out between this country and the State of which the foreigner is a subject the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise incur, no subject of the Crown can be allowed to evade the rule by entering into such a contract out of the jurisdiction and stipulating expressly or impliedly that the contract shall be governed by a foreign law. The late Mr. Westlake sums up the law on this point in the following proposition (*Private International Law, 4th ed.*, s. 215): 'Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law.' There is ample authority for this proposition".

II

Defendants' Exhibit F

HEYN & COVINGTON
60 WALL STREET
NEW YORK

February 9, 1918.

Alien Property Custodian,
Division of Corporations,
36th & P Sts., N. W.,
Washington, D. C.
Attention of Judge J. Davis Brodhead and
Mr. Andrew B. Duvall.

BOTANY WORSTED MILLS
STOEHR & SONS INC.

Gentlemen:

At the conclusion of our conference last Wednesday, February 6th, 1918, it was arranged that we put in written and summary form the various facts and statements made and hereby take pleasure in doing so.

AS TO WHERE THE CONTROL OF THESE COMPANIES IS:

As will be pointed out hereafter more in detail and as stated by us in our various conferences, CONSIDERABLY MORE THAN A MAJORITY CONTROL OF THESE COMPANIES IS IN ALIEN ENEMIES UNDER THE ACT. The exact figures and stockholdings are stated more at length below.

BOTANY WORSTED MILLS OF PASSAIC, N. J.:

The Botany Worsted Mills was organized in 1889 under the laws of the State of New Jersey. It was founded

by Mr. Eduard Stoehr of Leipzig, Germany, who is the head of the Stoehr family. He was also the founder of Stoehr & Co., a German corporation, which had been organized in 1880 and was engaged in Leipzig, Germany, in the manufacture of yarns and textile goods.

BYLAWS AND CERTIFICATE OF INCORPORATION:

We submit herewith a certificate of incorporation of the Botany Worsted Mills; also a copy of its bylaws which have been substantially in this form since its organization, with various amendments as to details, the last amendment having been made in 1913.

CAPITAL STOCK OF BOTANY WORSTED MILLS:

Present amount $3,600,000 all common stock, consisting of 36,000 shares; par value $100 each. There have been various increases of the original capital stock (which was $1,100,000) since the organization in 1889, the last increase to the present amount having taken place in 1908.

Botany Worsted Mills is engaged in the manufacture of worsted woolen and other yarn and textile goods. Its plant is situated in Passaic, New Jersey and the Company has about 6500 employees.

NUMBER OF DIRECTORS:

The bylaws provide that the number of directors shall not be less than seven nor more than eleven (bylaws, Article V, par. 2). The number of directors for any year is determined by the stockholders at their annual meeting (bylaws, Article V, par. 2). At the March, 1917 meeting they determined that there should be 10 directors. At the present time there are eight directors, whose names, residences, positions which they now occupy in the Company and the length of time of their connection with the Company are as follows:

PRESENT BOARD OF DIRECTORS (8 DIRECTORS WITH 2 VACANCIES):

Thomas Prehn, of Passaic, New Jersey, president, connected with the Company since 1889.

Hans E. Stoehr, of New York City, treasurer, connected with the Company since 1902.

Ferdinand Kuhn, of Bernardsville, New Jersey, vice president, connected with the Company since 1891.

Geo. G. Roehlig, of Passaic, New Jersey, superintendent and vice treasurer, connected with the Company since 1889.

Max W. Stoehr, of Passaic, New Jersey, secretary, connected with the Company since 1903.

Alfred de Liagre, of New York City, executive head of New York office and of the general sales department, connected with the Company since 1903.

Otto Kuhn, of Passaic, New Jersey, head of the woolen department, connected with the Company since 1905.

Camille Mehl, of Passaic, New Jersey, head of the yarn department, connected with the Company since 1915.

UNUSUAL NATURE OF THE DIRECTORSHIP OF THIS COMPANY:

The nature of the directorship of the Company has from the date of its organization been exceptional and different from that of most American companies in that this Company's Directors are actively engaged in the business and occupy responsible positions as officers or heads of departments. This has been the policy of the Company from the date of its organization, it being the purpose of the founder, Mr. Eduard Stoehr, that the directors should be real directors actually and personally interested in the business and giving their time and attention to it. The reward of the directors for the success of their work was to be accordingly. It will be noted that the directors in accordance with the provision of the bylaws receive as their compensation a sum equal to 32% of the profits after deducting a 6% dividend to the stockhold-

ers and 5% for reserve (Article 21, par. B, page 15). This provision of the bylaws has been in force with immaterial variations from the date of the organization of the Company in 1889. The variations relate to the percentage which was 25%, later 40% and then 32%.

It will be noted that there are now two vacancies in the Board. At the annual meeting in March, 1917, ten directors were elected, being the gentlemen above mentioned and Eduard Stoehr of Leipzig, Germany, and Geo. Stoehr, of Leipzig, Germany. In the spring of 1917 after the declaration of war, the Board pursuant to Article V, par. 6 of the bylaws, declared two directorships vacant because of the disability of Eduard Stoehr and Geo. Stoehr, due to the state of war and said vacancies have not been filled.

It will also be noted that all of the present directors and officers are residents of the United States.

Annual Meeting of Botany.

The annual meeting of the stockholders of the Company is held on the third Tuesday of March (Article XIII, par. I of the bylaws), the next annual meeting taking place on March 19, 1918.

Stoehr & Sons Inc., New York City.

This is a New York corporation, organized in February, 1917, which is the successor to Stoehr & Sons, a partnership in New York City, which consisted of Eduard Stoehr, of Leipzig, Germany, and his three sons, H. E. Stoehr, of New York City, M. W. Stoehr, of Passaic, New Jersey, and Geo. Stoehr, of Leipzig, Germany.

Certificate of Incorporation and Bylaws.

A copy of the certificate of incorporation and of the bylaws of this Company are submitted herewith.

CAPITAL STOCK OF STOEHR & SONS INC.:

Amount $250,000, consisting of 2500 shares, par value $100 each.

The business of the Company,—like that of its predecessor, the partnership of Stoehr & Sons,—is dealing in wool; part of its funds were used to help finance the operations of Botany and it also made investments in other American enterprises.

THE IMMEDIATE OCCASION for the organization of the corporation in February, 1917, was this: It was assumed that if there was a declaration of war between the United States and Germany, the partnership would probably have to cease, being dissolved by reason of the alien enemy character of Eduard Stoehr, the father, and Geo. Stoehr, the brother, the results of such dissolution being of course obviously unfortunate and conceivedly disastrous.

The partners retained the same proportional interest in the corporation as their interest in the partnership, namely, Eduard Stoehr, the father, 1875 shares, Geo. Stoehr, the brother, 222.21 shares (being represented by trust certificates held by M. W. Stoehr for his father and brother)—in other words somewhat more than 4/5ths interest in parties resident in Germany.

OFFICERS AND DIRECTORS OF STOEHR & SONS INC.:

The certificate of incorporation and bylaws of the company provide for four directors. They are as follows:

Hans E. Stoehr, President,
Geo. G. Roehlig, Vice President,
Max W. Stoehr, Secretary and Treasurer,
Alfred de Liagre, Ass't. Secretary and Ass't. Treasurer.

It will be noted that these directors and officers are the same gentlemen mentioned above as directors and officers etc. of Botany Worsted Mills and that all of them are residents of the United States.

As has been pointed out, the founder of the Botany Worsted Mills was Eduard Stoehr. As he is advanced in age (being 72 years) most of the active work during the past years has devolved on his sons. In this connection it may be stated generally that Eduard Stoehr, the father, and Geo. Stoehr, the brother, were in charge of the Stoehr interests in Germany, and H. E. Stoehr and M. W. Stoehr of the interests in the United States. H. E. Stoehr represented his father and also Stoehr & Company, the Leipzig corporation, in this country.

Stoehr & Co., the Leipzig corporation, is a German stock company with its plant near Leipzig, Germany. Eduard Stoehr occupied a position similar to that of a chairman of the Board of Directors and Geo. Stoehr the position of chief executive officer similar to president.

In February, 1917, the Board of Directors of Stoehr & Co. consisted of five members, viz: Eduard Stoehr, Hans E. Stoehr, Dr. Rosenthal, Paul Gulden and Carl Beckmann.

DETAILS AS TO STOCK CONTROL OF BOTANY WORSTED MILLS:

The following will show the stockholdings in Botany Worsted Mills:

Shares of 84 Alien Enemy Stockholders referred to in the list report made to the Alien Property Custodian by Botany Worsted Mills, Form No. 101, report No. 5263 (see typewritten list, Schedule 2, showing 10,700 shares in names of alien enemy stockholders from which are to be deducted 1205 shares referred to as having been purchased and paid for in 1916 by stockholders resident in U. S.).. 9,495

These 1205 shares were bought and paid for in 1916 by stockholders resident in the United States. But on account of interrupted communication the particulars as to the numbers of the certificates and the names of stockholders are incomplete (see report No. 5263, last page of Schedule 2).

The above mentioned 9495 shares include 2900 shares of Georg Hirsch, of Gera, Germany, standing in the name of Thomas Prehn (see report made by Thomas Prehn to the Alien Property Custodian. The report number and trust number of this report we do not know).

The above 9495 shares also include 1400 shares of Friederich Arnold, of Greiz, Germany, standing in the name of Thomas Prehn (see report by Thomas Prehn No. 3052, trust No. 468).

Shares referred to in report No. 5263 (see last paragraph of typewritten list of Schedule 2, and also report No. 1869, trust No. 4017, Schedule 12, and a copy of contract annexed thereto. See also Schedule 2, last paragraph and Schedule 4 of report No. 5263). These shares were in the name of H. E. Stoehr and M. W. Stoehr, as trustees for said Stoehr & Co., the Leipzig corporation, the beneficial interest being in Stoehr & Co. 14,900

Regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons Inc., from Stoehr & Co., of Leipzig, Germany, IT HAS BEEN FULLY EXPLAINED that the CONTROL OF BOTANY MIGHT BE IMPERILED BY A STATE OF WAR, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the decisions of the Courts, and if deprived of THE VOTING RIGHT, THE CONTROL OF BOTANY MIGHT BE LOST. This contract was made with REFERENCE TO THE CONTROL OF BOTANY AS BETWEEN ITS STOCKHOLDERS AND HAD OF COURSE NO REFERENCE TO THE STATUS OF SUCH CONTROL SO FAR AS THE ALIEN PROPERTY CUSTODIAN IS CONCERNED. *Such status is not affected whether such shares are in Stoehr & Co. the Leipzig corporation or in Stoehr & Sons Inc. the New York corporation.* AS WE ALSO STATED VERBALLY THERE HAVE

BEEN NO RESOLUTIONS OR OTHER CORPORATE ACTION BY STOEHR & CO., THE LEIPZIG CORPORATION, IN CONFIRMATION OF THIS TRANSACTION.

Additional shares belonging to Stoehr & Sons Inc. the New York corporation	5,685
Other stockholders in the United States, including the 1205 shares referred to above	5,920
TOTAL STOCK OF BOTANY	36,000.

To summarize: While Botany is managed in this country, CONSIDERABLY MORE THAN A MAJORITY OF ITS STOCK IS CONTROLLED BY ALIEN ENEMY INTERESTS WITHIN THE MEANING OF THE ALIEN ENEMY ACT; THE TOTAL OF THE STOCK THUS CONTROLLED (DIRECTLY AND INDIRECTLY) BEING 30,080 SHARES.

In accordance with the suggestion of Judge Brodhead and Mr. Duvall, we have stated in the foregoing letter the substance of the information verbally stated by us and contained in the reports made to the Alien Property Custodian. Of course, if any further information is desired we shall be glad to furnish it.

AS TO FURTHER CONFERENCE.

We refer to the suggestion made by Judge Brodhead at our last interview regarding a future conference and shall be pleased to hear from you as to what date will be convenient to your office.

AS TO THE EXECUTIVE COMMITTEE.

In addition to the foregoing may we take the liberty of calling your attention to Article XXIII of the bylaws of Botany (last page) which provides for an executive committee? Through this committee effective control may be exercised over the affairs of Botany. The number of

its members could, if desired, be reduced to three and its powers extended and such other appropriate restrictions adopted as may be deemed advisable.

Yours very truly,

HEYN & COVINGTON
Counsel.

Enclosures 4.

The foregoing approved.

BOTANY WORSTED MILLS,
By HANS E. STOEHR,
TREAS.

STOEHR & SONS INC.
By HANS E. STOEHR,
PRES.

(The four enclosures in the above letter were (a) certificate of incorporation of the Botany, (b) bylaws of the Botany, (c) certificate of incorporation of the New York Company, (d) bylaws of the New York Company).

Defendants' Exhibit G was a carbon copy of Defendants' Exhibit F with the foregoing original signatures of Hans E. Stoehr both as Treasurer of the Botany Worsted Mills and as President of Stoehr & Sons, Inc. (page 223; folio 424).

With Defendants' Exhibit G, defendants offered in evidence the official receipt of the postmaster of New York of the registered letter enclosing the original of Defendants' Exhibit F.

With Exhibit G there was also offered in evidence the registered return receipt from the Alien Property Custodian in the official form (page 223; folio 424).

III

Defendants' Exhibit X

BOTANY WORSTED MILLS
PASSAIC, NEW JERSEY

February 5, 1918.

Dear Mr. Heyn:

I wish to thank you for the *satisfactory message, which you gave me over the telephone,* reporting about your interview at the Department of the Alien Property Custodian. I am sorry that the permit for my coming to Washington was not granted. It might have helped to straighten out any questions. At the same time the evidence and information, which you have, may be sufficient to enable you *to bring this matter to a satisfactory conclusion.*

Herewith I am enclosing another letter, containing the information asked for in regard to the holdings of stock in the Botany Worsted Mills, and Stoehr & Sons Inc. In addition I give you a list of the stockholders of the Botany Worsted Mills as follows:

	Stoehr & Co.	14,900 Shares		
	Hirsch & Arnold...	4,100 "		
(X)	Various German stockholders	6,400 "		
			25,400	Shares
	Stoehr & Sons	5,685 "		
	Claimed by Prehn and others	1,205 "		
	Various Stockholders in U. S. A.	3,710 "	10,660	"
	Total:		36,000	Shares

(X) Including about 1000 shares of Austrian stockholders

I also enclose list of papers mailed to you under separate cover, by registered mail, SPECIAL DELIVERY.

I shall be at the New York Office all day tomorrow, Wednesday, Feb. 6th, in case you wish additional information.

With kindest regards to both Mr. Lenssen and yourself, I am

Sincerely yours,

Hans E. Stoehr

2 Enclosures

Herbert A. Heyn Esq.,
Hotel Raleigh,
Washington, D. C.

SPECIAL DELIVERY

February 5, 1918

List of Contents of Registered Letter sent to
Herbert A. Heyn, Esq.,
Hotel Raleigh,
Washington, D. C.

1. Matter proving purchase of 1205 shares, containing 83 different sheets.
2. By-laws of the Botany Worsted Mills.
3. Certified copy of extract of minutes of meeting of the Board of Directors of the Botany Worsted Mills, held on June 18, 1917, regarding unpaid dividends to stockholders, dividends on shares purchased by Directors of Company from C. H. Wolfram, and dividends to stockholders where stock certificates are not available.
4. Certified copy of extract of minutes of meetings of the stockholders of the Botany Worsted Mills and Board of Directors of Botany Worsted Mills, relating

to declaration and authorization of dividends after Jan. 1, 1916.

5. Balance sheet of March 20, 1917, of Botany Worsted Mills.
6. Notice to stockholders of Botany Worsted Mills, dated Passaic, Jan. 29, 1918.
7. Copy of certificate of incorporation of Stoehr & Sons Inc., dated Feb. 15, 1917.
8. By-laws of Stoehr & Sons Inc. adopted at first meeting of the stockholders of Stoehr & Sons Inc., Feb. 19, 1917.

IV

Defendants' Exhibit H

STOEHR & SONS INC.
200 Fifth Avenue
New York City

Cable
Stoehrsons
New York

February 5, 1918

Herbert A. Heyn Esq.
Hotel Raleigh,
Washington, D. C.

Dear Sir:

I herewith wish to state that THE MAJORITY OF THE STOCK OF THE BOTANY WORSTED MILLS, PASSAIC, N. J., AND OF STOEHR & SONS INC., NEW YORK, IS HELD BY PARTIES WHO ARE "ALIEN ENEMIES" UNDER THE "TRADING WITH THE ENEMY ACT."

This information is given by me as Treasurer of the *Botany Worsted Mills,* and as President of *Stoehr & Sons Inc.*

Yours very truly,

Hans E. Stoehr

V

An analysis of the three sworn reports of Max W. Stoehr and the Botany report

The Act provided (Sec. 7(a) that "any person in the United States who holds or has or shall hold or have custody or control of any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or *of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy* • • • shall • • • within thirty days after the passage of this Act • • • report the fact to the Alien Property Custodian *by written statement under oath*, containing such particulars as said Custodian shall require."

Sec. 16 provided that "whoever *shall wilfully violate* any of the provisions of this Act • • • and whoever shall wilfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both."

In connection with those provisions of the law, the sworn report made by Stoehr & Sons, Inc., dated December 6, 1917, becomes interesting. A photostatic copy of that report was offered in evidence by the plaintiff as plaintiff's exhibit 4 (pages 189-196; folios 360-364a) presumably to show the good faith, and even *eagerness*, of Max W. Stoehr to obey the law of the United States, just as his certificate of naturalization seemed to be produced in Court for the purpose of demonstrating his real *Americanization*. Let us glance at a copy of that report for the purpose of seeing the light it throws upon the acts and *sworn declarations* of Max W. Stoehr under the provisions of Sec. 7 (a) of the *Act*.

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The report gives (1) the name of the corporation as Stoehr & Sons Inc.; (2) the address of its principal place of business as 200 Fifth Avenue, New York City, New York; (3) states that it is a corporation; and (4) that it was organized under the laws of New York. Under Schedule 1, referring to "Enemy or ally of enemy officers and directors on or after October 6, 1917", it gives, in the first column entitled "Name", the word "None"; and in the second column entitled "Official position", the word "None".

In Schedule 2, which related to "Enemy or ally of enemy holders of stock, shares, *or certificates of beneficial interests* on or after October 6, 1917", it gave the following:

Name of Registered Owner.	*Name of Enemy or Ally of Enemy who is stockholder* OR FOR WHOM STOCK IS HELD.	*Residence (if unknown, last known address).*	*Nationality*	*No. of shares.*	*Par value of each share.*	*No. of Certificate.*	*Class or kind of stock.*	*Amount of dividends unpaid.*	*Actual location of Certificate.*
	1293								
Max W. Stoehr Trustee,	Eduard Stoehr	Leipzig Germany,	German	1875	$100	1	common stock voting trust certificate	6%	In Possession of Max W. Stoehr of Passaic, N. J.
	532								
Max W. Stoehr Trustee	Georg Stoehr	"	"	222.21	$100	3	"	6%	"

Schedule 3, relating to "Enemy or ally of enemy holders of stock, shares, or certificates representing beneficial interests on February 3, 1917", was as follows:

Name of Registered Owner who is enemy or ally of enemy.	*Residence (if unknown, last known address).*	*Nationality.*	*No. of shares.*	*Par value of each share.*	*No. of Certificate.*	*Class or kind of stock.*	*Amount of dividends unpaid.*	*Actual location of Certificate.*
None	None	.....	.....	.....	.....	.....	.....	.....

Schedule 4 and its answer were as follows:

"List of all cases in which the undersigned has *reasonable cause to believe* that the stock or shares on February 3, 1917, were owned or are owned by an enemy or ally of enemy, though standing on the books in the name of another.

* * *

"The following question must also be answered by the person making this report:

"Did you on February 3, 1917, or at any time on or after October 6, 1917, hold, have, or have the custody or control *of any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of* any person who is an enemy or ally of enemy, or whom you may have reasonable cause to believe to be an enemy or ally of enemy, and of which you have not yet made report to the Alien Property Custodian, or were you on February 3, 1917, or at any time on or after October 6, 1917, in any way indebted to any such person and have not yet made report of such debt to the Alien Property Custodian?

Answer: No. (See typewritten note attached)."

The following is the typewritten note "attached":

"Stoehr & Sons, Inc.

Note attached to list of stockholders &c. on Form 101 made to Alien Property Custodian.

This company was not in existence on February 3rd, 1917. HOWEVER IT STATES FOR THE INFORMATION OF THE ALIEN PROPERTY CUSTODIAN THAT IT WAS ORGANIZED ON FEBRUARY 19, 1917 UNDER THE LAWS OF THE STATE OF NEW YORK, TO TAKE OVER AND BECOME THE SUCCESSOR TO STOEHR & SONS, A PARTNERSHIP AT 200 FIFTH AVENUE, BOROUGH OF MANHATTAN, CITY OF NEW YORK, CONSISTING OF FOUR PARTNERS, namely, Hans E. Stoehr, New York City, Max W. Stoehr of Passaic, N. J., Eduard Stoehr and Georg Stoehr, the two latter of Leipzig, Germany. The capital

stock of the company was issued to the four partners in the same proportion as their interest in the partnership and the corporation assumed the indebtedness of the partnership."

Schedule 4 was signed in the margin, in the handwriting of Max W. Stoehr, as follows:

"Stoehr & Sons Inc.
by Max W. Stoehr,
Treas."

That report was signed as follows:

"STOEHR & SONS INC.
MAX W. STOEHR Treasurer & one
of the voting trustees."

It *was sworn to* by Max W. Stoehr December 6th, 1917.

Schedule 2 referred to "common stock voting trust certificate", but nowhere in that report was it stated that the voting trust *ran for five years.* Max W. Stoehr in that statement, initialed in the margin by him in his own handwriting, stated that the object of the corporation was:

"to take over and become the successor to Stoehr & Sons, a partnership at 200 Fifth Avenue, Borough of Manhattan, City of New York."

Not a word was stated there by Max W. Stoehr about *the contract of February 20, 1917.* His sworn statement was *false and misleading.* It has the *appearance* of frankness but it suppressed vital facts. It purported to be a report of *all* the property or stock, *"beneficial or otherwise * * * of * * an enemy" and it was not such a report.* The statement that the capital stock of the company "was issued to the four partners in the same proportion as their interest in the partnership and the corporation assumed the indebtedness of the partnership", *was cunningly designed to*

deceive the Alien Property Custodian and to divert attention from the 14,900 shares contract of February 20, 1917 and the encumbering of that stock by a five-year voting trust agreement.

The Stoehrs did not want to sell, by an absolute sale, the Leipzig company's stock. A part of their scheme was to pitchfork it into a New York company and then issue stock to themselves which they would tie up under a voting trust agreement for five years, before the expiration of which the war would be over. Hence Max W. Stoehr cunningly referred to *"common stock voting trust certificates" but did not state the period of the trust* NOR WHO THE TRUSTEES WERE. The statement that it *was "organized * * * to take over and become the successor to Stoehr & Sons, a partnership"*, while *in part* it represented the fact, essentially was false and misleading, for *it suppressed the fact* that *one of the chief objects, if not the great object,* of the organization of the New York company was to vest in it, or attempt to vest in it, the 14,900 shares, *as all the papers, all the declarations, all the acts, abundantly demonstrate.*

The Heyn letter shows that Max W. Stoehr's sworn report was false in essence.

The report by Max W. Stoehr, sworn to by him December 6, 1917, was, when all of the essential facts are considered, a misleading report and was a *"violation"* of the spirit of the law, if not its letter, and of the proclamations of the President and the requirements of the Alien Property Custodian issued in accordance therewith.

But the story of Mr. Max W. Stoehr's daring in December, 1917 did not end there.

He swore to two further reports to the Alien Property Custodian, both on December 3, 1917. One of those reports related to the voting trust certificate No. 1 standing in the name of Max W. Stoehr as trustee for Eduard Stoehr. That sworn report was defendants' exhibit Q-1 (pages 276-285; folios 490-497).

His sworn report as to the voting trust certificates standing in his name as trustee for Georg Stoehr was defendants' exhibit R-1 (pages 285-286; folio 498).

Again the undeniable *record facts* were stated accurately but real truth is suppressed. In each report there were careful "instructions" (1) to read carefully "all of this report" and "read instructions before beginning to make report," (2) definitions of the word "person" within the meaning of the act, (3) defined the "person whose property (including indebtedness owing him) must be reported," (4) defined "enemy" and "ally of enemy," (8) "who must make this report and what must be reported," etc. Under subdivision 8 the provisions of the *Act* were quoted requiring "any person in the United States who holds or has or shall hold or have custody or control of any property *beneficial or otherwise,* alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person *whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall,* * * * within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the Alien Property Custodian by written statement under oath."

Max Stoehr swore in defendants' exhibit Q-1 (pages 276-285; folios 490-497) that he held voting trust certificate No. 1 for 1875 shares of the New York company as trustee for Eduard Stoehr.

He swore in defendants' exhibit R-1 (pages 285-286; folio 498) that he held voting trust certificate No. 3 for 222.21 shares of the New York company for Georg Stoehr.

In each sworn statement he gave the name of the New York company, the residence of the enemy, and stated that the certificate was in his name and possession as trustee but that he "had no beneficial interest in the same," gave the par value of the shares, said that the stock was not in the market, that he could not give its market value but that he "estimated its value at about $350 per share, but he nowhere stated, in either report, *that the voting trust certificates ran for a period of five years and that he and*

his brother Hans E. Stoehr and their cousin Roehlig were the voting trustees. That was the suppression of a material fact.

There was a note attached to his sworn report in each case in which again he swore that the New York company *was organized on February 19, 1917 to take over and become the successor to Stoehr & Sons, a partnership.* He gave the location of the partnership, the members of the partnership, the names and residences of the partners, stated that the "capital stock of the company was issued to the four partners in the same proportion as their interest in the partnership" and then made a reference to "the indebtedness of the partnership to Eduard Stoehr, Georg Stoehr and *Stoehr & Company, a corporation of Leipzig, Germany,* which (as reported by Stoehr & Sons, Inc. in separate report to the Alien Property Custodian) became the indebtedness of said Stoehr & Sons, Inc., the New York corporation, *all indebtedness of the partnership having been assumed by said last named corporation.* All the directors and officers of the said New York corporation are residents of the United States."

Although the report *went into minute details on non-essential points,* it again suppressed the fact that the voting trust agreement ran for five years. It did not give the names of the voting trustees AND NO ALLUSION WHATEVER WAS MADE IN EITHER REPORT TO THE CONTRACT FOR THE 14,900 SHARES WITH THE LEIPZIG COMPANY. The evident intent of the report and of the typewritten statements embodied in it, initialed in the margin in the handwriting of Max W. Stoehr, was to convey the impression to the government officials that the *only transaction* that had taken place on the incorporation of the New York company was the turning of a partnership into a corporation. The apparently frank admission of the fact that the stock in the New York corporation was issued to alien enemies Eduard Stoehr and Georg Stoehr in the amounts named was *for the purpose of misleading* the Alien Property Custodian into a seizure of those trust certificates as alien owned, and was designed to have him overlook the continued own-

ership in the 14,900 shares and *to lead the government officers away* from the consideration of the facts that would have led to the discovery of *all* the facts regarding the contract of February 20, 1917.

Plaintiff's Exhibit 4 (pages 189-196; folios 361-364a) stated that Max W. Stoehr was trustee of the voting trust certificates of Eduard and Georg Stoehr, but it made no reference to the contract.

The case *against* Mr. Max W. Stoehr on those sworn reports comes down to this: If the *property* in the 14,900 shares passed to the New York company, then there was a *large debt* due to the Leipzig company which was not reported by him and which fact was suppressed by him.

If the property in the 14,900 shares did not pass to the Leipzig company under the contract, then there was a glaring suppression of a most material and vital fact by him, and that is the ownership of and continued interest in the 14,900 shares by the Leipzig company.

The relevance of several facts that were proved in the case *now* becomes apparent.

(1) Why Hans E. Stoehr, and *not* Max W. Stoehr, went forward to explain things, through Heyn and Lenssen, to the Alien Property Custodian.

(2) Hans E. Stoehr's *anxiety* while Heyn was in Washington about what the Alien Property Custodian would do, as shown by his two letters of February 5, 1918.

(3) Hans E. Stoehr's formal "approval" of the Heyn & Covington confession of February 9, 1918; and the careful way in which, under the guidance of the cunning Heyn, *Max W. Stoehr was kept out of all those transactions.*

In February, 1918 Max W. Stoehr was "having almost *daily* conferences with" Heyn (testimony, page 114; folio 221) and Heyn was reporting to Max W. Stoehr respecting his conferences in Washington with the Alien Property Custodian or persons in his office (testimony, page 114; folio 221). Max W. Stoehr then knew that the Alien Property Custodian was investigating this question and that Heyn as counsel for these two concerns went to Wash-

ington as a representative of those concerns, to explain how matters stood (page 112; folio 216). Max W. Stoehr testified that Heyn "made a report * * *. He went down for that reason to explain those reports to the Alien Property Custodian" (testimony, page 112; folio 216).

The conclusion is inevitable that they *all* realized that Max W. Stoehr, in swearing to the reports of December 3, 1917, defendants' exhibits Q-1 (pages 276-285; folios 490-497) and R-I (pages 285-286; folio 498), and swearing to the report of December 6, 1917, plaintiff's exhibit 4 (pages 189-196; folios 361-364a), had put himself in peril of the law, and hence we have the reason for the apparent anxiety of Heyn to "explain everything," and the actual anxiety of Hans E. Stoehr when Heyn was in Washington, and the "very satisfactory" telephone communication from Heyn to Hans E. Stoehr from Washington.

Max W. Stoehr's testimony was mendacious. An analysis of his two sworn statements of December 3, 1917 and of the one of December 6, 1917, in the light of *all* the facts, demonstrates that his testimony on the trial was quite in keeping with those misleading statements. His testimony was like his sworn reports—accurate and plausible upon non-essential points, *misleading and wholly lacking in veracity upon vital points.*

The Heyn letter was not a truthful letter. Its explanations about "stock control" did not tell *all* the facts. Heyn concocted the fake contract and the "rubber-stamp transfers," but his explanation was not even a rubber-stamp explanation. It was a cunning, crafty, apparently frank but essentially false, explanation of the real motive for the whole transaction, and if Heyn's letter had been put in the form of an affidavit it might have come under the criminal provisions of *The Trading with the Enemy Act* against false and misleading reports.

The attempts of counsel for the appellant to explain the Heyn letters were grotesquely at variance with the facts. They deliberately distort the plain meaning of Heyn's statements, for there in black and white, and in the two letters of Hans E. Stoehr to Heyn, the truth was

revealed beyond the powers of the sophistical reasoning of counsel for the appellant to obscure or distort.

Neither of the Stoehrs nor Heyn was the dupe of any blind belief in forms. Heyn was no slave to a legal theory, nor were the two Stoehrs with whom he was scheming. They did not *really think* that, if enough motions were made and resolutions passed and enough rubber stamps prepared and rubber-stamp entries made, the substance could be disregarded. They hoped that *all* the facts would not be discovered and they took a chance.

Nothing can excuse the attempt of Max W. Stoehr to swear through that dark scheme to cheat the law of the United States. When danger threatened him, he kept in the background and his brother Hans E. Stoehr and their counsel Heyn came forward "to explain" and in part to confess.

During the war Max W. Stoehr marked time, waiting only for a chance to try again to save an enemy alien's property by swearing to the honesty of the false and dishonest contract that he had schemed to make, and the very existence of which in his sworn report to the Alien Property Custodian he had suppressed. He has made a double attack upon the law of our country, one with his brother Hans E. Stoehr under the guidance of Heyn, and the second by his own misleading testimony and by the futile sophistries of his present counsel.

The issue of his second attempt will be the same as that of the first.

This leads to the

Botany Company's sworn report to the Alien Property Custodian

The Botany company made a sworn report to the Alien Property Custodian as required by law on December 11, 1917 (defendants' exhibit P-1; pages 274-276; folios 487-488). The report was sworn to at Passaic, New Jersey, by Thomas Prehn the president of the company.

The Botany report gave in detail the names of the alien stockholders, their residences, the number of shares owned by them and the numbers of the certificates representing the shares. In a detailed typewritten memorandum, made a part of that report, signed in the name of the Botany Worsted Mills, "by Thomas Prehn, President," and identified by Mr. Prehn personally, he went into the details regarding the purchase *abroad* in 1916 by stockholders of the company of 1205 shares, which he stated were believed to have been deposited in German banks, and that the company had proof "that the shares were actually bought and paid for by said resident stockholders."

He also swore that 2900 shares stood in the name of Thomas Prehn of Passaic, New Jersey, as trustee for Georg Hirsch, of Gera, Germany, which the Botany Company had "reason to believe belong to said Georg Hirsch. (See also Schedule 4 of this report)".

He also swore that 1400 shares stood in the name of Thomas Prehn, of Passaic, New Jersey, "as trustee for Friedrich Arnold, of Greiz, Germany", and which "this Company has reason to believe belong to said Friedrich Arnold. (See also Schedule 4 of this report)".

And then he made the following sworn statement:

"14,900 shares in the name of Stoehr & Sons, Inc., a New York corporation, IN WHICH THE COMPANY HAS REASON TO BELIEVE THAT STOEHR & COMPANY, A CORPORATION OF LEIPZIG, GERMANY, HAS AN INTEREST UNDER CONTRACT. On and prior to February 3, 1917, said last mentioned corporation had an interest in said shares which then stood in the name of H. E. Stoehr, New York City, and M. W. Stoehr, Passaic, New Jersey, as trustee. The numbers of the certificates are:—51-1050, 3441-3590, 4061-5000, and 1051-1400, 2004-2017, 2041-2060, 2151-2171, 2861-2884, 2890-2898, 3161-3260, 5251-5369, 5389-5411, 5451-5750 (See also Schedule 4 of this report)".

It is significant that, although Prehr stated in the report of the Botany, sworn to December 11, 1917, that the Botany company had "reason to believe that Stoehr &

Company, a corporation of Leipzig, Germany, has *an interest under contract*" in the 14,900 shares, none of the sworn reports of Max W. Stoehr to the Alien Property Custodian made at the same time, contained any reference to that contract.

Schedule 3 of the Botany report called for the details of "Enemy or Ally of Enemy Holders of Stock, Shares, or Certificates Representing Beneficial Interests on February 3, 1917". In the brackets of that schedule in the Prehn sworn statement, appeared the following: ("Same as list attached to Schedule 2 and Schedule 4").

Schedule 4 called for a "List of all cases in which the undersigned has *reasonable cause to believe* that the stock or shares on February 3, 1917, were owned or are owned by an enemy or ally of enemy, though standing on the books in the name of another". In the brackets in that schedule he gave "H. E. Stoehr, Trustee" for Stoehr & Co., Leipzig, Germany, 10,000 shares, and "M. W. Stoehr, Trustee" for Stoehr & Co., Leipzig, Germany, 4900 shares.

The statements in Prehn's sworn report, Schedule 4, were accurate, for Schedule 4 called for the facts "on February 3, 1917".

If the contract of February 20, 1917 did what on its surface it purported to do, then the Leipzig company had no "interest" in the 14,900 shares under that contract, except possibly as pledgee of the certificates representing the shares. But that would not be "an interest in the shares", if the contract was what on its face it purported to be.

While it is not claimed that those declarations of Prehn, as President of the Botany company, are "binding", whatever that pet phrase of counsel for the appellant may mean, on Max W. Stoehr, the report of Prehn throws a clear light upon (a) the sworn statements of Max W. Stoehr, (b) the subsequent anxiety, in the latter part of January and the early days in February, 1918, of his brother, Hans E. Stoehr, and (c) upon the partly-true admissions of Heyn and the panic-stricken letters of Hans E. Stoehr to Heyn when the Alien Property Custodian was making his investigation.

VI

Decisions and authorities establishing the principle that where the parties intended their acts and declarations to be shams, Courts will give such acts and declarations no legal effect

This principle is referred to in the beginning of the discussion of the law in Point I of our brief but for convenience of reference a few of the authorities are given below.

It is always competent to show, as stated in *Wigmore on Evidence*, Volume IV, Section 2406 (a) that:

"In all such cases, therefore, the conduct is legally ineffective, or void. In the traditional phraseology of the parol evidence rule, then, it may always be shown that the transaction was *understood by the parties not to have legal effect.*

"Ordinarily the bearing of this principle is plain enough on the circumstances. It has been judicially applied to household services rendered by a member of the family, and to a writing representing merely a family understanding. It is of course also applicable to the signature of an attesting witness. When the document is to serve the purpose of a mere *sham*, this principle in strictness exonerates the makers * * *. In all these cases a common understanding for all parties is here assumed to exist."

In *Elliott on Contracts*, Section 1641, the principles are stated as follows:

"There are many instances in which the purpose or object that the parties had in view becomes important, and may be shown without in any way contradicting or varying the terms of the written instrument. In such cases, it is clear that the parol evidence rule has no application to such evidence. There are also cases, *especially in*

equity, in which the true nature, purpose, or object of the transaction may be shown by parol even though it may apparently contradict the writing as to the consideration, object or purpose thereof as indicated therein. Thus, as elsewhere more fully shown parol evidence is admitted to show that a deed absolute on its face, was intended as a mortgage. So, parol evidence is admissible to show that the purpose of a written assignment of an instrument, although absolute in terms, was for collateral security, or that it might be collected, and, in some instances, the same rule applies to endorsements of promissory notes. It has also been held that parol evidence is admissible to prove that an endorsement by the payee was made at the request of the plaintiff to show that the note had been paid. Parol evidence has likewise been held admissible to show that a certificate of shares issued by the corporation to a third person at the request of a stockholder in place of those which he had held and which were surrendered and cancelled was intended as security for a loan. So, where a note has been delivered conditionally, or the like, and the obligation performed or discharged, this may be shown as between the parties."

One of the cases cited by the author of the foregoing is *Storey vs. Storey*, 214 Fed. Rep., 973 (Circuit Court of Appeals, 7th circuit, 1914). In that case an action was brought on a promissory note signed by the defendant. The defendant pleaded that he was a son of the plaintiff, and that he had entered into an agreement that his father should make to him as requested, gifts of money, as advancements in anticipation of his share of his father's estate, and that upon receiving the advancements he should give into the possession of his father papers in the form of promissory notes for the special and sole purpose of evidencing the amount of the advancements, and that his father should receive and hold and use the papers only as such evidence; that from time to time sums of money were given by his father and accepted by him as advancements and not otherwise; and that he gave, and his father received, the manual possession of the papers, sued on as

promissory notes, for the purpose of evidencing the amount of said advancements, and not otherwise.

Plaintiff's demurrer to the answer was sustained in the court below, and judgment was rendered for the plaintiff. The judgment was rendered upon the admitted facts by invoking the rule that parol evidence was not admissible in an action at law to contradict the terms of promissory notes as written contracts of debt.

On appeal that was held to be error, the Circuit Court of Appeals saying, at page 974:

"As the parol evidence rule is indisputable, the error was in the application. And probably nowhere is the basis of the error more clearly and simply stated than in *Pym vs. Campbell,* 6 El. & Bl., 370:

'The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, *but evidence to show that there is not an agreement at all is admissible.*'

"Delivery is an act. Whether the act has been accomplished cannot be told by reading the paper. Therefore, when a declaration on a written contract is met by a plea of no contract, the application of the rule against varying the terms of a written contract by parol to the inquiry whether there is a contract, is a plain begging of the question, is a *tour de force* assumption of the very issue to be solved.

"Delivery is a composite act. There must be both a manual transfer, actual or constructive, and an operation of minds intending to enter into the contract.

"In the ages-old strife for predominance between objective or external and subjective or internal measurements of conduct, evolution has been away from symbolism toward the inner truth. And in the law of commercial paper, between the original parties, the *animus contrahendi* has become the predominant element. This is shown by a provision of the Uniform Negotiable Instruments Act, which has been adopted in nearly all of the States."

In *Fleming* vs *Morrison,* 187 Mass., 120 (1904), there was an appeal from a decree admitting a will to probate. The probate court found that the testator was of sound mind, that no undue influence had been exercised, and that the will was executed properly. The case was reported for the consideration of the whole Court upon a report containing findings of fact. Among the findings were findings that the testator called upon one Goodridge and requested him to draw up a will leaving all his property to a woman. Goodridge thereupon drew up the will, the testator signed it and Goodridge attested it as a subscribing witness. Before the testator and Goodridge parted, the testator told Goodridge that this "was a fake will made for a purpose." The Court further found that the testator meant by that declaration that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and the purpose referred to by him was to induce the legatee to allow him, the testator, to have improper relations with her. Afterwards the testator determined to complete the execution of the will, and for this purpose he produced the instrument before two other attesting witnesses, told them that it was his will, that the signature was his signature, and asked them to attest and subscribe it as witnesses. Goodridge and the other two witnesses were all competent witnesses.

Under the law of Massachusetts at that time three witnesses were necessary to a will. The signature of the testator could be acknowledged before each witness separately.

It was held that probate should be denied on the ground that there was no *animus testandi* when the testator acknowledged before Goodridge and Goodridge signed as an attesting witness.

The Court at page 122 said:

"All the rulings asked for at the hearing have been waived, and the only contention now insisted upon by the contestants is that on the finding made at the hearing the proponent of the will has failed to prove the necessary

animus testandi. We are of opinion that this contention must prevail.

"The finding that before Butterfield and Goodridge 'parted' Butterfield told Goodridge that the instrument which had been signed by Butterfield as and for his last will and testament and declared by him to be such in the presence of Goodridge, and attested and subscribed by Goodridge as a witness, 'was a fake will, made for a purpose', is fatal to the proponent's case. This must be taken to mean that *what had been done was a sham.* This is not cured by the further finding that what Butterfield meant by this was 'that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and that the purpose referred to by him was to induce said Fleming to allow him, said Butterfield, to sleep with her.'

"This is not a finding that Butterfield intended to sign the instrument before Goodridge as and for his last will and testament, leaving the further execution to depend on future events. Much less is it a finding that Butterfield changed his mind after he had signed and had had Goodridge attest and subscribe the instrument. *The whole finding taken together amounts to a finding that Butterfield had not intended the transaction which had just taken place to be in fact what it imported to be,* that is to say, a finding that when Butterfield signed the instrument and asked Goodridge to attest and subscribe it as his will, he did not in fact then intend it to be his last will and testament but intended to have Mary Fleming think that he had made a will in her favor to induce her to let him sleep with her.

"We are of opinion that it is competent to contradict by parol the solemn statements contained in an instrument that it is a will, that it has been signed as such by the person named as the testator and attested and subscribed by persons signing as witnesses."

VII

Certain hypothetical considerations as to a conceivable intent of the Leipzig company in regard to the contract, if the Leipzig company had known of its existence

The vital question was what was the *intent* of the parties at the time of the contract; whether the parties *intended* to do what by the terms of the contract they purported to do; whether they *in fact intended* to make a contract at all.

This may be determined by considering the *intent* of the Leipzig company, taking into account not only the terms of the contract but all the facts and conditions that existed *at the time of its execution.* It abundantly appears that the officers of the Leipzig company *did not know of* the contract and of course *could have had no real intent with regard to it.* Assuming, however, without conceding, that (a) the contract was made *with* authority, which was *not* the fact; (b) that the legal title and the beneficial ownership in the shares passed from the Leipzig company to the New York company, which was *not* the fact; (c) that even on the face of the contract the ownership in the stock passed, which was *not* the fact; and (d) that the contract did *not* become void and abrogated and dissolved on April 6, 1917, when the United States declared that it was at war with Germany, although it did become void and was dissolved on that day—assuming that the officers of the Leipzig company *knew* of the contract *at the time it was signed,* the hypothetical *intent* of the Leipzig company (for it had no actual intent) can best be ascertained by stating the alternatives that were open to the Leipzig company upon the facts at that time.

There were three conceivable alternatives.

(1) The Leipzig company could have sold the 14,900 shares *for cash* and could have received the proceeds of the sale. Communication *by wireless* from this country

to Germany continued uninterruptedly during the months of January, February and March, 1917, and up to April 6, 1917, the date of the declaration of war. Transfers of *money from* the United States *to* Germany were freely made during that period. If there had been an honest, *bona fide,* intention on the part of the Leipzig company to sell the beneficial ownership in its shares, a sale for cash could easily have been arranged. The certificates properly endorsed and assigned by the Leipzig company could have been sent to a bank in a neutral contiguous country and that delivery could have been notified by wireless to the American purchaser and the certificates could be delivered by that bank to the American purchaser *at once,* and the stock could have at once been transferred, upon the receipt of a wireless notification from the Leipzig director of the assignment and delivery of the certificates, into the names of the American purchasers or their nominees in this country. The Leipzig company, by obtaining the cash, would have saved the proceeds of the stock from confiscation by the United States in the event of war. We have demonstrated the entire feasibility of making such a sale for cash. The Leipzig company in February, 1917, was not in a position to make *the best bargain possible.* It would perhaps have had to sell the 14,900 shares for cash at *some* sacrifice. But the only thing, as will be shown, for which the Leipzig company would have been willing to *sacrifice its shares was cash,* which could have been then transmitted to it and which would not have been subject to confiscation later on.

The Leipzig company did not intend to sell for many conceivable, though in this case *theoretical,* considerations:

(a) In February 1917 *practically all Germans in Germany were* clamoring for unrestricted sub-marine warfare and were *sure that Germany would win the war in three months by starving England by unrestricted submarine warfare.* The confidence in unrestricted submarine warfare to bring the war to an end in *three months* was *very general* in Germany. Hence the Leipzig company,

theoretically, would feel that (1) even if the United States came into the war there would be no sale by the United States, that the war would be over before the property could be seized and sold, and (2) that Germany as a victor in the war would dictate the terms of peace and the stock would be returned.

(b) The Leipzig company would, *theoretically,* not merely have an abiding belief in a German victory, and hence that there would be no seizure and no sale of German stock, but it would hope that the real facts of the contract would not be discovered, and that the apparent ownership in the New York company would deceive the United States officials.

(c) The Leipzig company would feel that, even if the real facts were discovered, the law *to be passed* by the United States regarding alien-owned property would provide *only for custody* of the property and management of the property during the war, and not for its sale, and hence it would be returned after peace, being carefully managed and safeguarded and augmented in the meantime.

(d) The Leipzig company, *also theoretically,* would feel secure because the certificates for the 14,900 shares *were in Leipzig in its possession.* It must at that time have felt fairly secure from a seizure of its stock in the ensuing war. The ability of the United States government to seize stock in a domestic corporation, the certificates representing the shares in which were in the hands of alien enemies, could not *then* have been realized in Leipzig, and, *again theoretically,* the Leipzig company would not have guessed so very wrongly in making that assumption, as the *present Trading with the Enemy Act,* as first enacted, did in fact provide for the transfer of shares to, or into the name of, the Alien Property Custodian, upon his demand, when *"accompanied by the presentation of the certificates which represent such shares or beneficial interests"* (sec. 12).

(e) Besides a large cash sum *then* received by the Leipzig company *in Germany* would doubtless have subjected it to very heavy war taxes or war levies, whereas *no sale* then saved it from such taxes and also saved the asset.

It required the amendment to the Act of November 4, 1918, to establish the right of the Alien Property Custodian to obtain the issuance to him of shares of stock, the former certificates for which were in enemy countries.

The Leipzig company would have taken risk in deciding, *again theoretically, not* to sell for cash.

But there would have been *no risk in a real cash sale.* But a *real sale* is just what the Leipzig company did *not then want.* There could have been no sale of the real ownership without a resultant (a) cash payment, or (b) a debt. A sale for cash, however, is what the Leipzig company did not want. A credit resulting from a sale could easily be seized. In failing to sell its stock for cash, it, *again theoretically,* showed its intention *not* to make a *bona fide* sale of its stock *for credit.*

(2) The second theoretical alternative was to sell the 14,900 shares to an American citizen or an American corporation on credit, as the contract purported to do. But, if the contract were what it purported to be, it could and would result in *no advantage* to the Leipzig company, but on the other hand would have resulted in a distinct detriment. The only object in making any contract, except for a *cash sale,* was to preserve the asset of the Leipzig company, but *credit* due *from* an American citizen or an American corporation *to* the Leipzig company was an asset in far greater peril in the event of war than *stock in an American corporation.* A *debt* due *from* an American *to* a German corporation could be easily seized by the United States, and the possibility of such seizure was, on February 20, 1917, fully understood. Such seizure was well known in the law of *all* countries, and the right to make such seizure had been fully exercised by *all the then* belligerent powers. With regard to stock in an American corporation, the situation was different.

The Leipzig company, as explained, must have felt fairly secure from the seizure of its stock because it had in its possession the certificates. *Theoretically* it must have argued that, so long as it held the certificates rep-

resenting the shares, they could not be seized and sold in this country.

If it be suggested that it would be to its advantage to give a long credit, and extend the time of default, and at the conclusion of the war on the default of the New York company regain the shares, or that on the conclusion of peace it could disaffirm the contract and regain the shares, the answers *are conclusive*, namely: (a) that the Alien Property Custodian succeeded under the *Act* as originally passed, to *all the rights* of the Leipzig company, that (b) he could treat the contract as a sham, as no contract, and as voided and abrogated by war and so seize the shares, or (c) he could *disaffirm* the contract *on behalf of* the Leipzig company and regain the shares; or (d) recognizing the contract, he could put the New York company in default and thus regain and sell the shares. Either course would have resulted in a loss of the asset to the Leipzig company. The only result, so far as the United States was concerned, would be that the five-year voting trust of the New York company would place a cloud upon the title to the shares and that to sell a majority of the Botany stock he would have to sell the voting trust certificates held for the two aliens, that such a sale would carry with it *all the other* assets of the New York company, and would restrict the number of bids and would bring a smaller price than a sale of the Botany shares direct.

But that diminished sale price could be of *no conceivable benefit* to the Leipzig company, for that would merely diminish the amount of the funds in the hands of the Treasurer of the United States.

The five-year voting trust of the New York company's stock would make a sale difficult. Such a sale would involve either (a) the sale of the two alien owned voting-trust certificates, carrying with it the majority ownership of the stock of the New York company, and indirectly a majority of the Botany stock, which would be a cloud on the title, would make a sale difficult, and would naturally diminish the sale price, or else (b) it would result in a law suit to vacate and annul the voting trust and remove

the voting trustees. But in either *event there would be no gain to the Leipzig company.*

A third alternative is presented by the fact that the Alien Property Custodian could sell (a) the rights of the Leipzig Company to disaffirm the contract; (b) *his* rights as the successor of the Leipzig company *under* the contract; (c) his rights under his seizure of the shares, and (d) his undisputed title to the voting trust certificates held by the two alien enemies. But again such a sale would be the sale of a complicated asset, would discourage purchasers who might feel that they were buying into a law suit, would be the sale of assets under a cloud, and would obviously bring a greatly diminished sale price, which would diminish the funds in the hands of the Treasurer of the United States, *but would in no sense benefit the Leipzig company.*

If we are to go into *theoretical* considerations of what *might have been* in the minds of the Leipzig company, had it *known* of the contract, considerations such as the foregoing must be conceded in the minds of the Leipzig company at the time of the making of the contract.

To say then that the Leipzig company would have been willing to transfer its asset from *stock in an American corporation,* the certificates for which it *then* held, to a *credit* or debt due *from* an American corporation is to say that the Leipzig company intended to do something which must at that time have appeared to greatly imperil its asset. It would be giving up its stock and would receive in return only *a credit* which was more easily confiscable than the stock itself. It is not a sufficient answer to say that, as above pointed out, the Leipzig company was not in a position to make a *good bargain.* By exchanging its stock for credit, it would make *no real bargain at all.* If the consideration had been *cash,* the argument that it was not in a position to make a good bargain would have some point, because then the Leipzig company would at least get *something.* By exchanging its stock for a *credit,* it would get *nothing.*

The Leipzig company was not in the position of one who was compelled to take any port in a storm. But the

contract, by giving the Leipzig company a *mere credit* for its stock, did not even provide a port in a storm. It *saved the Leipzig company nothing at all!*

(3) The third *theoretical decision by the Leipzig company* is one which was actually made *here*, without of course its knowledge or consent. That was, under the *guise* of a contract of sale, to attempt *to cover up* the real ownership which all the time remained in the Leipzig company. All of the evidence points to the fact that that was the alternative which would have been adopted by the Leipzig company. It is borne out by the Heyn & Covington letter of February 9, 1918. In that letter Heyn & Covington stated that the contract was made "because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of the voting right, the control of Botany might be lost".

The Leipzig company, being in possession of the *certificates* for the 14,900 shares, probably felt secure from seizure. It no doubt would have reasoned that since the certificates were in its possession, they could not be seized in the event of war, and after the war was over its right as a stockholder would be restored. In the meanwhile however the voting right might be lost.

The figures given in the Heyn & Covington letter show in what manner the voting control would be lost to the Stoehr interests. That letter gives the number of shares in which alien enemies had a beneficial interest at that time (including the 14,900 shares), as 24,395
The shares belonging to Stoehr & Sons, Inc., were 5,685
Other stockholders in the United States owned 5,920

Total stock of Botany 36,000

It will be seen at a glance that eliminating the alien enemy owned shares—the 24,395—the *American* shareholders, other than Stoehr & Sons, Inc. could outvote Stoehr & Sons, Inc. by 235 shares.

By putting the *record* ownership of the 14,900 shares in Stoehr & Sons, Inc., *"the voting control"* of Botany would be preserved to the Leipzig interests, and Heyn, when cornered, said that this was all that was intended to be accomplished by the contract, for, as above shown, a sale for *credit* would not have been of any benefit to the Leipzig company, and had there been a genuine intention to sell the beneficial interest that sale would have been *for cash*, and such a sale was not made.

Heyn and the two Stoehrs must have hoped that the subterfuge would not be discovered, and that the voting control of the Botany would be held by the voting trustees of Stoehr & Sons, Inc., the beneficial ownership of the 14,900 shares all the time being in the Leipzig company. But even if the subterfuge should be discovered, they must have expected that any confiscation act the United States would pass would be *similar to some past war acts*, and would provide merely for the *custody* of seized property *in specie* and would *not* provide for a sale of such property. So that Heyn and the two Stoehrs must have expected that, even if that subterfuge were discovered, the worst that could happen would be that the United States government would seize the stock and retain *it safely in custody* until the end of the war.

It is no answer to this to say that the debt of the New York company for the stock was distributed over a period of five years, the first payment to be made on February 20, 1918. War was then imminent, and there was no presumption that the war would be over prior to the first payment. Besides, a government at war can seize debts both due and to become due to alien enemies, and can seize obligations of any kind and nature due to alien enemies.

The two Stoehrs and Heyn probably counted upon the United States law *being the same as past laws* and providing for *only custody* and *not* for confiscation.

They did not want to sell, but to give a deceptive ownership to the New York company, and, if caught in the act, to explain that only the control during the war was intended.

Heyn knew that he was engaged in a desperate game. Hence he got Hans E. Stoehr's written "approval".

The contract was cunningly and craftily intended to trick and deceive the government officers, and if and when caught, they were to be ready with the explanation that only "stock control" was intended.

If the contract was intended to provide *only* for "stock control", then it was a lie. If the contract intended to provide for *more* than "stock control", then *the Heyn and Stoehr letters were lies. Liars cannot always be logical and not always consistent.*

They may theoretically have reasoned, and but for the amendment of November 4, 1918, they would have on one point reasoned correctly that (a) a debt should be created, (b) that its payment should be apportioned and postponed, (c) that though there was a debt and the Alien Property Custodian might succeed to it, he could do nothing for fourteen months, that (d) the war might be over before the expiration of the fourteen months and (e) that the law would not compel a sale. If that was the way the Stoehrs and Heyn reasoned in February 1917, they reasoned wrongly, for they overlooked the fact that the resultant debt could be seized and collected, and the voting trust certificates could be seized and sold, only that either or both such seizures would produce a less sale price, which could be of no benefit to the Leipzig company.

One year later, in February 1918, when the facts were being investigated, they knew what the law was. They *then* knew that either way the Leipzig company would lose. So they admitted that there was no sale, and hence that there was no debt to be seized, and took their position upon the explanation as to stock control.

In short, we have a case of *hopes* in February 1917 and *fears* in February 1918.

If there was a real sale intended, there was no reason, so far as the Leipzig company's interest was concerned, why there should be a five-year voting trust. The stock of the Botany was not widely distributed. It remained in the same control after as before, and before as after. But it was to defeat the right of capture of the United States

and to save the property for the Leipzig company that the contract was made.

There was no reason for a five-year delay. There was no reason for a sale that allowed nothing for good will, a very important element of value in the asset.

If there had been an honest sale, there was no reason for a voting trust. If there was a secret intention, then there *was* a good reason for a five-year voting trust.

In fact the Alien Property Custodian did seize the rights, privileges and benefits of the Leipzig company under the contract (defendants' exhibit L-1, pages 271-272; folios 478-480). That seizure was made March 13, 1919, *after* the seizure of the 14,900 shares, and it was *expressly stated* that said demand "shall not prejudice or affect any demands, heretofore * * * made with respect to said 14,900 shares" or "any rights, privileges or benefits acquired by virtue thereof".

To conclude:

If there had been a real intention to make such a contract it would not have helped the Leipzig company or saved its asset. Its recitals were false and were intended to mislead United States government officials. Max W. Stoehr's sworn statements to the Alien Property Custodian were misleading. The Heyn and Covington letter to the Alien Property Custodian proved the falsity of the recitals in the contract. The two letters of Hans E. Stoehr to Heyn were unequivocal admissions of the facts therein stated and demonstrate that the contract was a sham from beginning to end.

VIII

The legal title to the 14,900 shares never passed from the Leipzig company to the New York company

We have shown that the Leipzig company never had any intention to make the contract or to transfer the shares. But even assuming that it did have such an intention, which is quite contrary to the fact, intention is not the whole thing. There are numberless things or transactions which may be intended but never become legally effective *because the intention is not followed by the required legal act.* A man may *intend* to make a will, but unless the legal formula is observed, unless the legal requirements are followed, his intention is nothing. A man may *intend* to execute a deed, but unless it is properly acknowledged it is worthless. The officers of a company may have the *intention* to do a legal act, but unless the by-laws are observed their words and writings amount to nothing.

The New York parties to the contract, not to speak of the Leipzig company, did not take the proper legal steps to transfer the *legal title* to the 14,900 shares of stock to the New York company.

Before considering the records on the books of the Botany with reference to the original issue and subsequent transfers of the 14,900 shares, it is necessary to consider the provisions of the by-laws (defendants' exhibit J, pages 225-228; folios 427-429).

Article XVIII of said by-laws was as follows:

"Transfer of Shares.

"Transfer of shares, so as to entitle the holder to be recognized as owner of the company, *shall only be made upon the books of the company by the holder or owner in person or by power of attorney.* For the convenience of the European shareholders such transfer may be accomplished in the following manner: The certificates may

be deposited, properly endorsed, with the Vice-Treasurer at Leipzig, or *with any Director resident at Leipzig, who is to* CERTIFY *such transfer or assignment to the Treasurer at the principal office of the company* and the Treasurer shall *thereupon* note such transfer upon the share-book of the company *and* ADVISE *the Vice-Treasurer or such Director at Leipzig of the transfer so made. It shall be the duty of the Vice-Treasurer or such Director resident at Leipzig to retain the certificate deposited with him, until he shall be advised by the Treasurer of the completed transfer".*

The provisions of article XVIII of the by-laws did not provide for a *surrender and cancellation* of the old certificate upon any proposed transfer. The first sentence of the article provided that the transfer "shall only be made upon the books of the company by the holder or owner in person or by power of attorney". There was no provision, almost universal in by-laws of American corporations, that transfers shall be made only upon the presentation *and surrender* and cancellation of the old certificate. Under the peculiar provisions for the convenience of the European shareholders, the certificates to be transferred were to be deposited with a vice-treasurer or a director resident at Leipzig, but such vice-treasurer or director was to retain the certificate only until he should be *advised* by the treasurer of the company of the completed transfer, as provided in said article XVIII.

The form of stock certificate employed by the company from the time of its organization to the year 1918 differed from the usual form of certificate of American corporations (plaintiff's exhibit 6, folios 372-375). All of the stock of the company was issued in five-share certificates (Zimmerman, page 132; folio 260), each certificate being in the form of plaintiff's exhibit 6. The certificates, instead of having on the back thereof one form of assignment and power of attorney, as is the usual form in the case of American corporations, had 22 blank forms of such assignment and power of attorney. Attached to the certificate, plaintiff's exhibit 6, was a sheet of coupons. The

coupons were numbered consecutively and there were two coupons for each year subsequent to the date of the issuance of the certificate. Each coupon purported to certify that the holder was entitled to receive the amount of the preliminary dividend or the final dividend, as the case may be, declared for the first half or the second half of the business year of the Botany Worsted Mills stated on the coupon (plaintiff's exhibit 6). Attached to the dividend sheet was a so-called talon. The talon purported to entitle the holder thereof to receive the second series of coupons and delivery thereof at the office of the company at Passaic, New Jersey, or by surrender to the Algemeine Deutsche Credit Anstalt in Leipzig (plaintiff's exhibit 6).

The form of stock record kept by the Botany also differed from the ordinary form used in American corporations. The record of stocks kept by the company consisted of a large book containing a whole page for each five share certificate outstanding (Zimmerman, pages 132-133; folios 260-261; defendants' exhibit N, page 231; folio 435). Each page of the book contained at the top the name of the person to whom the corresponding five-share certificate had been originally issued, together with the certificate number and share number. On the same page there were a number of blank forms under the general heading of "Transfers". Each of said blank forms was printed as follows:

> "Transferred to .....
> by deposit of certificate with.....
> Passaic, N. J., ...190....
> .....Treas."

(defendants' exhibit N).

Under the by-laws and using the above described form of stock certificate and stock record, the practice of the company with reference to transfer (1) in cases where the certificates were in the United States, and (2) in cases where the certificates were in Germany, was as follows:

1. Where the certificates were in the United States the customary and unvarying practice of the company

was that the certificate representing shares proposed to be transferred *had to be presented to the Treasurer with proper endorsement thereon.* The certificate was then stamped "Transfer registered on the books of the company dated.....", and redelivered to the person requesting the transfer. This was the uniform practice of the company. No new certificates were made out (Zimmerman, page 135; folio 264). The by-laws did not provide for the surrender and cancellation of the old certificate. The form of stock certificate in use at that time contemplated a number of assignments on the back thereof. The certificate, after being presented and stamped as above set forth, was returned to the holder.

2. In the case where the certificates were not in this country but were in Germany and a transfer was to be made for European shareholders, the procedure was different. The by-laws provided in such a case that the certificates were to be *deposited, properly endorsed,* with the vice-treasurer at Leipzig or with a *director resident in Leipzig,* who was to *certify* such transfer or assignment *to* the treasurer *at* the principal office of the company, *and* the treasurer should "thereupon *note* such transfer upon the share-book of the company *and advise* the vice-treasurer or such director at Leipzig *of the transfer so made.*" In the case of such a deposit, the vice-treasurer or director resident at Leipzig sent to the Botany company a certificate that a designated certificate or certificates had been deposited with him, properly endorsed to a person named "with the request to cause the same to be transferred upon the books of the company to the above named endorsee" (Zimmerman, page 132; folio 260; defendants' exhibit M, pages 230-231; folio 434).

After the treasurer of the Botany received such advice (defendants' exhibit M) from the vice-treasurer or director at Leipzig, the transfer was entered on the record of stock (defendants' exhibit N). When the treasurer of the company at Passaic received the certificate from the vice-treasurer or director resident at Leipzig, he was to "note such transfer upon the share book of the company",

and was then required to "*advise* the vice treasurer or such director resident at Leipzig of the transfer so made". It was the duty of the vice treasurer or such director resident at Leipzig "to retain the certificate deposited with him until he shall be *advised* by the treasurer of the completed transfer" (bylaws, article XVIII; defendants' exhibit J, pages 225-228; folios 427-429).

There was nothing in the by-laws requiring that the "certificate" from the director in Leipzig or the "advice" from the treasurer in Passaic SHOULD BE IN WRITING.

No transfers were made on the books of the Botany in the absence of either a notification from Leipzig or the production of the stock certificate, bearing the proper endorsement, at the Passaic office (Zimmerman, page 133; folio 261).

We come now to the facts with respect to the attempted transfer of the 14,900 shares.

The notation of transfer upon the 2980 pages of the book of stock records of the Botany Company representing the 14,900 shares was as follows:

> "Transferred to (printed) Stoehr & Sons, Inc., New York (rubber stamp) *by deposit of certificate with* (printed) *Georg Stoehr Director* (rubber stamp) *Passaic, N. J.* (printed) *February 20, 1917* (rubber stamp).
>
> Hans E. Stoehr (rubber stamp)
> Treas." (Printed)

(testimony of Zimmerman, pages 136-137; folio 266).

On February 20, 1917, there was not even an attempt to comply with the provisions of the by-laws. The Botany company did not have in its records any certificate purporting to be *from* Leipzig, and there was *no evidence* in the Botany company at the time this transfer was made that there was *any deposit* of the certificates *with* Georg Stoehr, director in Leipzig. Again, Zimmerman testified that he made the notation to Stoehr & Sons, Inc., *at the direction of Hans E. Stoehr* (Zimmerman page 137; folio 267).

Complainant's claim was that the New York company has title to the 14,900 shares. As above shown, he has failed to prove that it either obtained the physical certificates or a transfer of the stock represented by the certificates on the books of the Botany company in accordance with its by-laws. The establishing of title to the shares *in* the New York company was essential to the plaintiff's case, and the failure on February 20, 1917, to make the transfer of the shares in accordance with the by-laws of the company so as to pass the legal title thereto, was and is *fatal to the legal title of the New York company.*

There was no attempt whatever on February 20, 1917, to comply with the Botany by-laws. Their provisions were completely and utterly disregarded. There was no attempt to amend the by-laws so as to fit the facts of this transaction. Had the certificates been in this country, they would have had to be produced and a *formal assignment* of them made by Hans E. Stoehr and Max W. Stoehr respectively, and they would have had to be duly stamped as transferred. Nothing of the sort was done. Had they been in the usual American form, they would have had to be produced, duly endorsed by the two Stoehrs as trustees, with signatures duly witnessed, with the usual power of attorney for their transfer; or separate stock powers or assignments executed by the two Stoehrs as trustees would have had to be delivered to the Botany with the certificates themselves. Nothing of that sort was done. IT WAS NOT EVEN PROVED THAT THERE WAS ANY FORMAL OR INFORMAL ASSIGNMENT OR TRANSFER OF THEIR RIGHTS AS TRUSTEES IN THE CERTIFICATES BY EITHER HANS E. STOEHR OR MAX W. STOEHR OR BOTH TO THE NEW YORK COMPANY. A MORE COMPLETE AND UTTER FAILURE OF PROOF ON THE CRUCIAL POINT RESPECTING THE PASSING OF THE TITLE AND THE EXECUTED OR EXECUTORY NATURE OF THE TRANSACTION IT WOULD BE DIFFICULT TO IMAGINE.

"The sole authority for the transfer" of the 14,900 shares from the names of Hans E. Stoehr and Max W. Stoehr, as trustees for the Leipzig corporation" was "Hans E. Stoehr's personal directions to" Zimmerman (Zimmerman, 181).

Their ponderous and bungling attempts at regularity, their disregard of the letter as well as of the spirit of the by-laws of the Botany in the attempt to transfer the legal title of the shares to the New York company, when the United States was on the brink of war, their seeming reliance upon printed words and rubber stamps and oral instructions, was not because the two Stoehrs and their counsel Heyn did not know better, but because they could do nothing else or more, except to communicate by wireless with the Leipzig company, which they could easily have done but which is precisely what they did not want to do, because had they told the truth their confession would have been on record, and had they not disclosed the secret understanding the Leipzig company would not have consented to the transaction, so they did all that they then dared to do.

IX

Digest and analysis of the testimony offered by the defendants as to wireless communication between the United States and Germany in January, February, March and up to April 6, 1917

Wireless transfers of money were made from the United States to Germany in January, February and March and up to April 6, 1917 (testimony, page 158; folios 304-305). Mr. Barrand, one of the vice-presidents of the National Bank of Commerce in New York, testified that subject to congestion (page 158; folios 304-305), wireless transfers of money were made during January, February and March, and up to April 6, 1917, the same as before (page 159; folio 307), and that the messages even increased in number toward the end of that period (page 159; folio 308). Mr. Barrand testified that the messages were subject to United States censorship and were censored by the cable authorities (page 158; folio 305). Business communications could be sent (page 158; folio 305) but after diplomatic relations had been broken off, the censorship became no more rigorous with regard to business communications than it had been before. The *testimony was uncontradicted* that there was no discrimination against messages containing German names (pages 158-159; folio 306 of Barrand's testimony and testimony of Mr. Smith, page 177; folio 335).

Mr. Barrand, who showed complete familiarity from his own personal experiences with cable communications throughout the war and down to date, and also as to mail between this country and countries of Europe, testified, respecting *wireless communications*, that

"The Sayville station continued throughout the war to send messages. I think it was taken by the Postal Cable company, which is controlled by the Commercial." As to the Tuckerton wireless station * * * "The United

States government finally took it over, and the Western Union Telegraph company continued to use it" (Barrand, page 157; folio 304).

"* * * The Commercial had the Sayville and the Western Union had the Tuckerton" (Barrand, page 157; folio 304).

Mr. Barrand also testified as follows:

"Messages by wireless to and from Germany, in the years 1915 and 1916, and to my knowledge down to April 6, 1917, were despatched over the wireless route in very large volume. * * * And some banks even transmitted and received money by cable and wireless transfers right down to the eve of the war April 6, 1917" (pages 157-158; folios 304-305).

And again:

"With respect to the wireless service, subject to the congestion of the great number of messages, there was free communication between Sayville and Tuckerton and the other side until April 6, 1917,—I do not say but what there may have been April 5th, but there was communication with Germans freely throughout March 1917, subject to the congestion. The communication was subject to the United States Government censorship; that is they could not send a wireless saying that the steamship Mauretania was leaving the Port of New York, for instance. Business communications could be sent, and the Government censors had to be satisfied that it related to business, and not to an act of war in preserving the United States' neutrality" (page 158; folio 305).

While Mr. Barrand's experience was chiefly confined to the Bank of Commerce and to messages relating to financial transactions, that bank "had other messages" (Barrand, page 159; folio 306), although its *wireless messages* during January and February and March related *"principally to the transmission of money"* (Barrand, page 159; folio 306).

In answer to questions by the Court, Mr. Barrand testified:

"We transmitted during the months of February and March, 1917, wireless transfers to Germany the same as we did before. There may have been a difference,—I cannot recall what the delays were during that period but as far as the censors went I found no change. I know nothing beyond the transmission of moneys and the dispatches relative to its delay, or to its receipt and so on. There may have been other messages but none that I recall" (page 159; folio 307).

On redirect examination the witness further testified:

"I was familiar with the activities of the other companies in sending and receiving messages by wireless from this country and Germany in the year 1916 and in January, February and March of 1917, by other financial institutions.

By Mr. Quinn:

Q Now, is it not a fact *that the number of messages increased* in January, February and March, if possible, over what they were before? A *They did increase.* In some of the companies, of course, they had a situation which they wanted to clear out of and consequently messages did increase" (page 159; folio 308).

The testimony of Mr. Barrand was explicit *and uncontradicted* that there was free communication by wireless and transfers of money and despatches relative to the transfer of money as above shown.

Isaac Smith, who was the superintendent of tariffs of the Postal Telegraph Company, during that period and subsequently, testified that there was no difference between financial messages and messages of other kinds. Mr. Smith had already testified that to the best of his recollection messages were received right up to the outbreak of the war, from Germany by wireless, and were sent from this country to Germany by wireless (page 176; folio 335). Then Mr. Smith testified as follows:

"We took all kinds of messages. There was no difference, as far as I know, between financial messages and messages of other kinds, so far as their being received and sent" (page 176; folio 335).

The Postal Telegraph Company, of which Mr. Smith was the superintendent of tariffs, prior to the outbreak of war with Germany, accepted messages at its offices in the United States, transferred the same to the Atlantic Communication Company at Sayville, and it then transferred the same by wireless from the station at Sayville to Nauen, Germany (testimony of Smith, page 176; folio 335).

It was stipulated that other witnesses from the Western Union Company, operating the Tuckerton wireless station, would testify to the same effect (testimony, page 177; folio 336).

Mr. Barrand is one of the vice-presidents of the National Bank of Commerce in New York, and has been connected with that bank for a period of twelve years (page 156; folio 301). He had been in the foreign department of that bank for that whole term (page 156; folio 301). It was part of his duties, as one of the managers of the foreign department, to be familiar with and to know the facilities for communicating by cables and wireless. Even if Mr. Barrand's testimony should be limited to his actual experience from his own knowledge in the National Bank of Commerce, although actually it was not, it is a fact of which the Court will no doubt take judicial notice, that what was true of one great bank in New York city at that time engaged in foreign business would be true of all, and that, even conceding that Mr. Barrand's testimony should be limited to the operations of the National Bank of Commerce, it is not conceivable that the National Bank of Commerce could send and receive wireless messages in January, February and March, 1917, and up to April 6, 1917, and that other banks engaged in foreign exchange in New York city and business men generally could not and did not send or receive such messages.

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AUTHORITIES CITED.

STATUTES AND EXECUTIVE ORDERS.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

MAX W. STOEHR, SUING IN HIS OWN BEHALF as a stockholder in Stoehr & Sons, Inc., and in behalf of all others similarly situated, Appellant,

v.

JAMES N. WALLACE ET AL., APPELLEES.

No. 546.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR A. MITCHELL PALMER, INDIVIDUALLY AND AS ALIEN PROPERTY CUSTODIAN, AND FRANCIS P. GARVAN, INDIVIDUALLY AND AS ALIEN PROPERTY CUSTODIAN, ON APPEAL BY THE COMPLAINANT FROM A FINAL JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK THAT THE ORIGINAL AND SUPPLEMENTAL BILLS OF COMPLAINT HEREIN BE DISMISSED UPON THE MERITS.

This is a suit in equity to enjoin the sale by the Alien Property Custodian of certain shares of stock in a corporation known as the Botany Worsted Mills. The appellant is not the owner of the stock, but alleges that he is a stockholder in another corporation which he claims is the owner of the stock in

question. Relief is sought upon the ground that (1) the statutes do not authorize the custodian to seize this stock or to sell it in the manner he proposes, and (2) if the statute does authorize these things it is unconstitutional.

DECREE OF THE COURT BELOW.

The case was heard on the merits and the bill was dismissed. (Rec., p. 319.)

THE PLEADINGS.

There were an original and a supplemental bill. (Rec , pp. 1, 20.) It is not necessary now to set out the allegations of either, since every material allegation was put in issue by answers (Rec., pp. 29, 51, 73, 79, 84, and 92), and the facts upon which the case must be determined will be set out later.

When the bill was filed A. Mitchell Palmer was Alien Property Custodian. Pending the suit, he resigned and was succeeded by Francis P. Garvan, who was substituted as a defendant. (Rec., p. 28.)

STATUTES INVOLVED.

The original Trading With the Enemy Act, as approved October 6, 1917 (40 Stat., c. 106, p. 411), provides, section 2, that the word "enemy," as used in the Act, is to be deemed to mean (*a*) any individual, partnership, or other body of individuals of any nationality, resident within the territory of any nation with which the United States is at war, and any corporation incorporated within such territory of any nation with which the United States is at war;

(*b*) the government of any nation with which the United States is at war, or any political municipal subdivision thereof. That the word "person," as used in the Act, shall be deemed to mean an individual, partnership, association, or company or other unincorporated body of individuals or corporation or body politic. That the words "end of the war," as used therein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace; that the words "to trade" shall be deemed to mean (*a*) pay, satisfy, or give security for the payment or satisfaction of any debt or obligation; (*b*) draw, accept, pay, present for acceptance or payment, or endorse any negotiable instrument or chose in action; (*c*) enter into, carry on, complete, or perform any contract or agreement or obligation; (*d*) buy, sell, lease, or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property; (*e*) to have any form of business or commercial transactions or intercourse with.

Section 3 provides that it shall be unlawful (*a*) for any person in the United States, except with the license of the President, granted to such person, or to the enemy or ally of enemy, as provided in this Act, to trade, or attempt to trade, directly or indirectly, with, to, or from, or for, or an account of, or on behalf of, or for the benefit of any other person, with knowledge or reasonable cause to believe that such other person is an enemy, or ally of enemy, or is conducting or taking part in such trade, directly or indi-

rectly, for or on account of, or on behalf of, or for the benefit of an enemy, or ally of enemy; (*b*) for any person to send or take out of, or bring into, or attempt to send, take out, or bring into the United States any letter or other writing or tangible form of communication, except in the regular course of the mail.

By section 6 the President is authorized to appoint and prescribe the duties of an official to be known as the "Alien Property Custodian," who shall be empowered to receive all moneys and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to such custodian under the provisions of the Act; to hold, administer, and account for the same under the general directions of the President, as provided in the Act.

By section 7 it is provided that every corporation, incorporated within the United States, and every unincorporated association or company or trustee or trustees within the United States, issuing shares or certificates representing beneficial interests, shall under such rules and regulations as the President may prescribe transmit to the Alien Property Custodian a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation, association, company, or trustee has reasonable cause to believe to be, an enemy or ally of an enemy resident within the territory, or a subject or citizen residing outside of the United States, of any nation with whom the United States is at war, or resident within the territory, or a subject

or citizen residing outside of the United States, of any ally of any nation with which the United States is at war, together with the amount of stock or shares owned by each such officer, director, or stockholder, or in which he has any interest. That the President may also require a similar list to be transmitted of all stock or shares owned on February 3, 1917, by any person now defined as an enemy or ally of an enemy, in which any such person has any interest; and he may also require a list to be transmitted of all cases in which such corporation, association, company, or trustee has reason to believe that the stock or shares on February 3, 1917, were owned or are owned by such enemy or ally of enemy, though standing on the books in the name of another.

It further provides that any person in the United States who holds, or has, or shall hold, or has custody or control of any property, beneficial or otherwise, alone or jointly with others, or for or on behalf of an enemy, or ally of an enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of an enemy, and any person within the United States who is, or shall be indebted in any way to an enemy or ally of an enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of an enemy, shall, with such exceptions, and under such rules and regulations as the President shall prescribe, report the fact to the Alien Property Custodian by written statement, under oath, containing such particulars as such custodian shall require. The President may also require similar

report of all property so held of, for, or on behalf of, and of all debts owing to any person now defined as an enemy or ally of an enemy on February 3, 1917. It is further provided that nothing in this Act shall render valid or legal, or shall be construed to recognize as valid or legal, any act or transaction constituting trading with, to, from, for, or on account of, or on behalf of, or for the benefit of an enemy, performed or engaged in since the beginning of the war and prior to the passage of this Act, and any such Act or transaction herein performed or engaged in, except as authorized hereunder, which would otherwise have been or be void, illegal or invalid at law. No conveyance, transfer, delivery, payment, or loan of money or other property in violation of section 3 hereof, made after the passage of this Act, and not under license as therein provided, shall confer or create any right or remedy in respect thereto, and no person shall by virtue of any assignment, indorsement or delivery to him of any debt, bill, note or other obligation or chose in action by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of an enemy, have any right or remedy against a debtor, obligor, or other person liable to pay, fulfill or perform the same, unless such assignment, indorsement or delivery was made prior to the beginning of the war, or shall be made under license as therein provided.

It further provides that nothing in this Act contained shall prevent the carrying out, completion, or transfer of any contract, agreement, or obligation

originally made with, or entered into by, an enemy or ally of an enemy, where prior to the beginning of the war, and not in contemplation thereof, the interest of such enemy or ally of enemy devolved by assignment or otherwise upon a person not an enemy or ally of an enemy, and no enemy or ally of enemy shall be benefited by such carrying out, completion, or performance, other than by release from obligation thereunder. It is further provided by subdivision c that if the President shall so require, any money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license, which the President after investigation shall determine is so owing, or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered, and paid over to the Alien Property Custodian. Subdivision d provides that, if not required to pay, convey, transfer, assign, or deliver under the provisions of subdivision c, any person not an enemy or ally of an enemy who owes to, or holds for, or on account of, or on behalf of, or for the benefit of an enemy or of an ally of enemy, any money or other property, to whom any obligation or form of liability to such enemy or ally of an enemy is presented for payment, may at his option, with the consent of the President, pay, convey, transfer, assign, or deliver to the Alien Property Custodian, said money or other property under such rules and regulations as the President shall prescribe. Subdivision e expressly provides that no person shall be held liable in any court for, or in

respect to, anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act; that any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same, to the extent of the same.

Section 8–a provides that any person not an enemy or ally of an enemy, holding lawful mortgage, pledge or lien, or other right in the nature of security in property of an enemy or ally of an enemy, which by law or by the terms of the instrument creating such mortgage, pledge or lien or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of an enemy, who is a party to any lawful contract with an enemy or ally of an enemy, the terms of which provide for a termination thereof upon notice, or for acceleration of maturity on presentation of demand, may continue to hold said property, and after default may dispose of the property in accordance with law, or may terminate or mature said contract by notice of presentation or demand, served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or contract, and under such rules and regulations as the President shall prescribe, and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally. Subdivision b provides that any

contract entered into, prior to the beginning of the war, between any citizen of the United States or any corporation organized within the United States and an enemy or ally of enemy, the terms of which provide for the delivery during or after any war in which a present enemy or ally of an enemy nation has been, or is now, engaged, or anything produced, mined or manufactured in the United States may be abrogated by such citizen or corporation by serving 30 days' notice in writing upon the Alien Property Custodian of his or its election to abrogate such contract.

Section 9 of the Act provides that any person not an enemy or ally of an enemy, claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian hereunder, and held by him, or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of an enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim, under oath, in such form, and containing such particulars as the said custodian shall require, and the President, if application is made therefor by the claimant, may, with the consent of the owner of said property and all persons claiming any right, title or interest thereunder, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money

or other property so held by the Alien Property Custodian, or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled, provided that no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property.

If the President shall not so order within 60 days after the filing of such application, or if the claimant shall have filed a notice as above required and shall have made no application to the President, such claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in a District Court of the United States for the district in which such claimant resides, or if a corporation where it has its principal place of business, to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant, to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted, then the money or other property of the enemy or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the

defendant or by the Alien Property Custodian or Treasurer of the United States, on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated. Except as therein provided the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process or execution, or subject to any order or decree of any court.

Section 10 provides that nothing contained in this Act shall be held to make unlawful certain Acts. But none of these exceptions apply to this case.

Section 12 provides that all moneys paid to or received by the Alien Property Custodian, pursuant to the Act, shall be deposited forthwith in the Treasury of the United States; that all other property of an enemy or ally of an enemy, conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian thereunder, shall be safely held and administered by him, except as thereinafter provided. The President is authorized to designate as a depositary or depositaries of property of an enemy or ally of an enemy any bank or banks, or trust company or trust companies. The Alien Property Custodian may deposit with such depositary or depositaries or with the Secretary of the Treasury any stock, bonds, notes, time drafts, time bills of exchange, or other security or property, except money, and such depositary or depositaries shall be authorized and empowered to collect any

dividends or interest or income that may become due and any maturing obligation held for the account of such custodian; that the Alien Property Custodian shall be vested with all the powers of a common law trustee, in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of that Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or thing in respect thereto, or make any disposition thereof, or any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and to protect such property, and to the end that the interest of the United States in such property and rights, or of such person as may ultimately become entitled thereto, or the proceeds thereof, may be preserved and safeguarded; that it shall be the duty of every corporation incorporated within the United States and every unincorporated association or company or trustee or trustees, within the United States, issuing shares or certificates representing beneficial interests, to transfer such shares or certificates upon its, his, or their books, into the name of the Alien Property Custodian upon demand, accompanied by the presentation of certificates which represent such shares or beneficial interest; that the Alien Property Custodian shall forthwith deposit in the Treasury of the United States, as

thereinabove provided, the proceeds of any such property or rights so sold by him; that after the end of the war any claim of any enemy or an ally of an enemy, and any money or other property received and held by the Alien Property Custodian or deposited with the United States Treasurer, shall be settled as Congress shall direct.

Section 16 provides punishment for a violation of any of the provisions of the Act.

By an Act approved March 28, 1918, c. 28 (40 Stat., 459, 460), the fourth paragraph of section 12 of the Trading With the Enemy Act was amended so as to read as follows:

> The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided*, That any property sold under this Act, except when sold to the United States,

shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of the time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further*, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for resale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. * * *

By an act approved November 4, 1918, c. 201 (40 Stat. 1020), subdivision *c* of section 7 of the Trading with the Enemy Act, approved October 6, 1917, was amended to read as follows:

> If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trademarks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act. * * *
>
> Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person

or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

EXECUTIVE ORDERS.

By an Executive order by the President on the 12th of October, 1917, printed at page 286 of the record, the President vested in the Alien Property Custodian the executive administration of all the provisions of section 7–a, section 7–c, and section 7–d of the Trading With the Enemy Act, including

all power and authority to require lists and reports and to extend the time for filing same, conferred upon the President by the provisions of said section 7–a, including the power and authority conferred upon the President by the provisions of said section 7–c to require the conveyance, transfer, assignment, or delivery or payment to himself, at such time and in such manner as he shall prescribe, of any money or other property owing to or belonging to or held for, by, or on account of or on behalf of or for the benefit of any enemy or ally of enemy which, after investigation, the Alien Property Custodian shall determine to be so owing or so belonging or so held. The President further vested in the Alien Property Custodian the execution and administration of all the provisions of Section 8–a, section 8–b, and section 9 of the Trading With the Enemy Act so far as said sections relate to the powers and duties of said Alien Property Custodian. The Alien Property Custodian was further authorized to take all such measures as may be necessary and expedient and not inconsistent with law to administer the powers hereby conferred, and shall further have power and authority to make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of Section 7–a, section 7–c, section 7–d, and section 8–b, conferred upon the President by the provisions thereof and by the provisions of section 5–a, said rules and regulations to be duly approved by the Attorney General.

By an Executive order issued on the 5th day of February, 1918, the President amended paragraph 30 of the Executive order dated October 12, 1917, thereby providing that any person not an enemy or ally of an enemy, who owes to or holds for or on account of or on behalf of or for the benefit of an enemy or ally of an enemy not holding a license, any money or other property, or to whom any obligation or form of liability to said enemy or ally of an enemy is presented for payment, having first obtained the consent of the Alien Property Custodian, may pay, convey, transfer, assign, or deliver to or upon the order of the Alien Property Custodian such money or other property with like effect as if said payment, conveyance, transfer, assignment, or delivery was made in obedience to the requirements pursuant to the provisions of section 7, subdivision c of the Trading With the Enemy Act; and paragraph 31 was amended, whereby the President vests in the Alien Property Custodian the executive administration of all provisions of section 8–a and section 8–b of the Trading With the Enemy Act, including the power and authority conferred or imposed upon the President by the provisions of said section 8–a, and the notice therein required to be given to the President shall be given to the Alien Property Custodian. (P. 288 of the record.)

The President, on the 28th of February, 1918, issued an Executive order prescribing the rules and regulations respecting the exercise of the power and

authority and the performance of the duties of the Alien Property Custodian under the Trading With the Enemy Act and prior Executive orders, pursuant thereto. (P. 289 of the record.) In that Executive order, subdivision c, of subdivision 1, the words "right," "title," "interest," "estate," "power," and "authority" of an enemy, as used therein, shall be deemed to mean, respectively, such "right," "title," "interest," "estate," "power," and "authority" of the enemy as may actually exist, and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include, respectively, the "right," "title," "interest," "estate," "power," and "authority" at law, or in equity, or otherwise of any representative of or trustee for an enemy or other person claiming under, or in the right of, or for the benefit of the enemy.

By subdivision 2 of this Executive order (subdivision a) the Alien Property Custodian may make demand for the conveyance, transfer, assignment, delivery, and payment of any money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy, not holding a license granted by the President or in the exercise of his power and authority, which the Alien Property Custodian, after investigation, shall determine is so owing or so belongs or is so held, together with every right, title, interest, and estate of the enemy in and to such money and other property and every power and authority of the enemy thereover, including, but without limiting

the generality of the foregoing, the power and authority to affirm, ratify, approve, revoke, repudiate, or disprove, in whole or in part, and at any time or times, any power, agency, trust, or other relation at the time existing, and also any act or omission theretofore, done in the execution of or pursuant to any power, agency, trust, or other relation which the enemy could or might lawfully revoke, repudiate, disaffirm, ratify, or approve; and also including, but without limiting the generality of the foregoing, the power and authority to supervise and control the future exercise of any power, agency, trust, or other relation over such money or other property to the extent that the enemy could or might lawfully direct, supervise, and control the same.

A demand for the conveyance, transfer, assignment, delivery, and payment of money and other property, unless expressly waived or limited, shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded, as well as every power and authority of the enemy thereover.

Subdivision c of section 2 also provides when demand shall be made and notice thereof given as hereinabove provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to the possession of the money or other property demanded, and such power and authority thereover as may be included within the demand, and the Alien Property Custodian may thereupon proceed to

administer such money and other property in accordance with the provisions of the Trading With the Enemy Act and with any orders, rules, or regulations heretofore, hereby, or hereafter made by the President or heretofore or hereafter made by the Alien Property Custodian.

Under clause 3 of this Executive order, subdivision d, the Alien Property Custodian may exercise any right, power, or authority of the enemy in, to, and over corporate stock, shares, or certificates representing beneficial interests owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of, an enemy, including (1) the right to receive all notices issued by the corporation which issued such stock, shares, or certificates; (2) the right to exercise all voting power appertaining to such stock, shares, or certificates; (3) the right to receive all subscriptions or dividends and other distribution and payment, whether of capital or income, declared or made on account of such stock, shares, or certificates, regardless of whether or not such stock, shares, or certificates be in the possession of the Alien Property Custodian, and regardless of whether or not such stock, shares, or certificates have been transferred to the Alien Property Custodian upon the books of the corporation, association, company, or trustee issuing the same.

That the Alien Property Custodian may demand the transfer of the corporate stock, shares, or certificates representing beneficial interests to be made upon the books of any corporation, unincorporated asso-

ciation, company, or trustee issuing the same into the name of the Alien Property Custodian.

Subdivision f (at p. 292 of the Record) provides that the Alien Property Custodian may sell and deliver any commodity or other tangible property which may be perishable or which may in the preservation thereof involve expense, and the Alien Property Custodian may sell and deliver any right, appurtenant to the ownership of the corporate stock, shares, or certificates, or beneficial interests, in cases where such rights would lapse, unless exercised within a limited time.

The Alien Property Custodian may manage, conduct, and operate any business belonging to or held for, by, or on account of, or on behalf of, or for the benefit of any enemy, in a case where the continuation of such business may seem necessary to prevent waste, or to protect such business, and in the management, operation, conduct, sale, or other disposition of such business the Alien Property Custodian may exercise every right, power, and authority of the enemy.

By further Executive order issued by the President on the 16th day of July, 1918, the Alien Property Custodian was given the power and was authorized and directed to hold, manage, administer, protect, preserve, control, and sell, or otherwise dispose of, in accordance with the rules and regulations, any and all property, other than money, which has been, or shall be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the

provisions of the Trading With the Enemy Act, as amended, and the Executive proclamations or orders issued pursuant thereto (p. 295 of the record).

By the fifth clause of that Executive order the Alien Property Custodian is given full power and discretion with respect to property to be sold, and may sell any property or property rights as an entirety in such groups or parcels, and at such time and place as he shall determine, and without reference to the previous enemy or ally of an enemy's ownership thereof.

And by subdivision 6 of that order, it is provided that—

> Whereas said Trading with the Enemy Act as amended provides that "any property sold, except when sold to the United States, shall be sold only to American citizens at public sale to the highest bidder, after public advertisement of the time and place of sale, which shall be where the property or a major portion thereof is situated, unless the President, stating the reasons therefor in the public interest, shall otherwise determine."

The President then determines otherwise as follows:

> (a) Shares of stock or other beneficial interest in a corporation, unincorporated association, company or trust, and claims, receivables and intangibles of all kinds may be advertised and sold wherever the Alien Property Custodian shall determine; and it shall be immaterial whether such shares of stock or other beneficial interest and such claims, receivables and intangibles be represented or evidenced

> by certificates or instruments or writings of any kind, and whether the Alien Property Custodian shall or shall not have possession or control thereof in the event that the same shall be thus represented or evidenced.

And the reasons for the foregoing determinations in the public interest are specified. By subdivision 9, printed at page 300, it is provided:

> The Alien Property Custodian * * * shall have power and authority to do any and all things reasonable or proper in or about or in respect of the exercise of any of the powers and authority specifically granted above; and in addition are authorized and directed hereby to manage all such property and to do any act or things in respect thereof or make any disposition thereof or any part thereof by sale or otherwise and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof, in like manner as though the Alien Property Custodian were the absolute owner thereof, subject to no limitations or restrictions other than those specifically set forth herein or in said "Trading with the Enemy Act," as amended, or any prior Executive orders issued pursuant thereto not in conflict herewith.

THE FACTS.

The number of shares of stock of the Botany Worsted Mills claimed in the bill as the property of Stoehr & Sons (Inc.) (a New York corporation) is 20,590, but the Alien Property Custodian has in fact seized and threatened to sell only 14,900 shares of

such stock. The court in its opinion recognized this limitation and the only question presented to it was as to the 14,900 shares of the Leipzig Corporation (Rec. 318), and dismissed the bill.

This brief will be confined to a discussion of the title to these 14,900 shares of the Botany Worsted Mills stock, which is all the stock of Stoehr & Sons (Inc.) that the custodian has seized or claims the right to sell. These 14,900 shares of the stock of the Botany Worsted Mills were for many years prior to February 20, 1917, the property of Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft of Plagwitz, Leipzig, Germany, which will hereafter be called the Leipzig company.

The Botany Worsted Mills Corporation was organized on May 11, 1899, under the laws of New Jersey for the business of the spinning of wools, worsted and yarns, and the manufacture of dress goods and men's wear. The capital stock of this corporation was $3,600,000, and consisted of 36,000 shares of the par value of $100 each. Ever since its incorporation it has been, and is now, engaged in the business of manufacturing woolens and worsted cloths and yarns (Rec. 104, 105). The firm in Leipzig was founded about 1880 and the one in America about 1889. At that time there was a firm of Stoehr & Sons in Leipzig, a partnership, and there was a corporation known as the Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft of Plagwitz, Leipzig. Stoehr & Sons, a copartnership, did business in America, one partner in America and one partner in Ger-

many, and the firm had assests both in Germany and America (Rec. 119). The partnership seems to have consisted of Eduard Stoehr, the father, Georg Stoehr, who lived at Leipzig, Hans E. Stoehr, who is a German citizen and lived in this country, and the plaintiff, Max W. Stoehr, who lives in this country and had become naturalized as an American citizen in 1911 (Rec. 119, 120). The Kammgarnspinnerei Stoehr & Co. was a corporation existing in Germany at Leipzig. There were five members of a body which corresponds to an executive committee on the American side. These five members were Eduard Stoehr, Hans E. Stoehr, and three other members, who lived in Germany. There were two directors of this corporation, Georg E. Stoehr and Dr. Kuntze, who lived in Germany.

The capital of this German corporation was 12,000,000 marks. The plaintiff was the owner of 600,000 marks. Eduard Stoehr was a large stockholder—larger than Hans or the plaintiff—and Georg Stoehr was also a stockholder. The stock of Stoehr & Co. is on the exchange in Leipzig and Berlin, and it is there largely traded in. There were a large number of other stockholders (Rec. 119, 120). When the Botany Worsted Mills was incorporated the stock issued was to the Stoehr family. The American copartnership of Stoehr & Sons seems to have been organized on May 1, 1913. The parties were Eduard Stoehr, of Germany; Hans E. Stoehr, of New York City; Georg Stoehr, of Leipzig, Germany; and the complainant, Max W. Stoehr, of Passaic, N. J.

These copartnership articles are printed at page 210 of the record. Eduard Stoehr, the father, and Hans E. Stoehr were to be active partners, and Georg Stoehr and the complainant, Max W. Stoehr, were to be silent or passive partners. The active partners were to have the sole charge and conduct of the business and represent the copartnership, and were to have the sole right to make and sign contracts or other papers relating to the affairs of the copartnership or to incur any liability on its behalf. The silent or passive partners could not without written consent of the active partners participate in the conduct of the business or sign or incur any liability on its behalf. The active partners were to have the right to conduct the business in such manner as they might think best, except that no transaction involving a value of more than $25,000 could be consummated without the written consent of all the partners (Rec. 211). The capital of the copartnership was $560,000, of which Eduard Stoehr contributed $420,000; Hans E. Stoehr, $80,000; and Max W. Stoehr, the complainant, $10,000 (Rec. 212).

Prior to 1914 these 14,900 shares seem to have stood on the books of the corporation of Botany Worsted Mills in the name of this Leipzig corporation. (See Vote Annual Meeting of Stockholders from 1910 to 1914, p. 246.)

On January 15, 1915, 10,000 of the 14,900 shares were transferred to Hans E. Stoehr as trustee for the Leipzig corporation, and on February 25, 1915, 4,900 shares were transferred to Max W. Stoehr, the com-

plainant, as trustee for the Leipzig corporation. (See Rec. 106, 232.)

The European war then commenced (in August, 1914). The certificates of this stock for 14,900 shares, standing in the name of the Leipzig corporation, were in Germany and had never been sent to this country, and had not been canceled by the Botany Worsted Mills Corporation, but apparently certificates of stock had been issued to Hans E. Stoehr and Max W. Stoehr as trustees. This was the condition which existed until early in February, 1917, when diplomatic relations between the United States and the Empire of Germany were severed, and it was perfectly plain war would shortly ensue. Eduard Stoehr and Georg Stoehr, two members of this copartnership, were in Germany. Hans E. Stoehr (a German citizen, but a resident of this city) and Max W. Stoehr (an American citizen who had been naturalized) were in this country, and, so far as appears, without any communication with the German members of the firm or with the German corporation, those residents of this country started to put their affairs in order to meet the situation that then existed. The copartnership, which by its articles of copartnership could not execute any obligations imposing liability of more than $25,000 without the consent of all the partnership, started to incorporate its copartnership business under the laws of the State of New York. A corporation was organized by Max W. Stoehr, Alfred de Liagre, and Georg G. Röhlig, and that

certificate is printed at page 184 of the record. The directors for the first year were the incorporators and Hans E. Stoehr. The subscribers to the capital stock of the corporation were Max W. Stoehr, eight shares; Georg G. Röhlig, one share; and Alfred de Liagre, one share.

The first meeting of the incorporators was held on the 19th of February, 1917, and a resolution was adopted whereby the firm of Stoehr & Sons transferred to the corporation the business mentioned in their written offer, for the entire capital stock of the company, to wit, $250,000. There was presented at that meeting an offer, signed by Stoehr & Sons, to sell the business, property, good will, firm name, and other assets of Stoehr & Sons, in consideration of $250,000 of the common stock of the company. The offer having been accepted, Stoehr & Sons, by an instrument in writing printed at page 189 of the record, bargained, assigned, transferred, and set over to the corporation, all of the property of the copartnership for the issue of 2,500 shares of stock. This transfer was signed by Hans E. Stoehr in the name of Stoehr & Co. These 2,500 shares of stock of the New York corporation were issued to—

	Shares.
Max W. Stoehr	1,875
Hans E. Stoehr	357.14
Max W. Stoehr	223.21
Max W. Stoehr	44.65

Thereafter all of the said shares of stock of Stoehr & Sons (Inc.) were transferred to Hans E. Stoehr, Max W. Stoehr, and Georg Röhlig, as voting trus-

tees, and voting trust certificates were then issued as follows:

	Shares.
Max W. Stoehr, as trustee	1,875
H. E. Stoehr	357.14
Max W. Stoehr, trustee	223.21
Max W. Stoehr, trustee	44.65

(Rec. 256.)

The corporation then being organized, it was necessary to dispose of these 14,900 shares of the Botany Worsted Mills, then in the name of Hans E. Stoehr, 10,000 shares as trustee for the Leipzig corporation, and 4,900 shares in the name of Max W. Stoehr, in trust for the Leipzig corporation, and thereupon there was executed the contract annexed to the bill, upon which this action is based. That contract is printed at page 14 of the record.

Thus the situation of the parties at the time of the transactions in question was as follows:

The Stoehr family.

The Stoehr family is composed of Eduard Stoehr, the father, and his three sons, Georg, Hans, and Max, all native Germans, originally residing at Leipzig. Eduard and Georg have continued their residence at Leipzig and are German subjects. Hans removed to the United States early in 1900 and resided here until his death in March, 1918. He was a German subject, although he had taken out his first papers toward becoming a naturalized citizen. Max removed to the United States early in 1900 and has since continuously resided in the United States. He is a naturalized citizen.

Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft.

This is a German company and was founded in 1880 by Eduard Stoehr. It has since owned and operated a woolen mill at Leipzig. It had a share capital of 12,000,000 marks. Max owned 600,000 marks. Hans owned 1,000,000 or more marks. Georg owned between 1,000,000 and a half and 2,000,000 marks; Eduard owned more than any of the sons, but the amount is not definitely shown by the testimony. There were many other stockholders, and its stock is listed on the Berlin Exchange. The father has continuously held important office in the German company and exercised a large measure of control over its affairs. According to the latest information he was president of the Aufsichstrat, a position corresponding largely to that of the chairman of the board of directors of an American corporation. Georg, according to the latest information, was one of the two directors in whom the active management of the corporate affairs is lodged. Hans was, until his death, a member of the Aufsichstrat.

Botany Worsted Mills.

This is a New Jersey corporation and was formed by Eduard in 1889. It has since owned and operated, at Passaic, N. J., a wool and yarn mill—the largest and most complete plant of its kind in the United States, if not in the world. It has a capital of $3,600,000, divided into 36,000 shares. The Stoehrs have always held important offices in this corpora-

tion and largely dominated its affairs. At the time of the execution of the sales contract, Eduard, Georg, Hans, and Max were all directors. Hans also held the office of treasurer, in which office the by-laws vested, in a very large and unusual way, the active management of the corporate affairs. Max was the secretary.

Stoehr & Sons—The partnership.

In 1913 Eduard and the three sons formed a partnership under the name of Stoehr & Sons in which Eduard owned about 75 per cent, Hans about 14 per cent, Georg about 9 per cent, and Max about 2 per cent. The partnership had assets both in Germany and in the United States and conducted an active business in both countries. Among its assets were 5,690 shares of Botany Worsted Mills stock. (The balance sheet of Stoehr & Sons (Inc.) lists 6,090 shares, but it appears that it was the record owner of only 5,690 shares and the claim to the additional 400 shares is not explained.) Certificates for only 1,290 of the 5,690 shares were in the United States, the remainder being in Germany. The partnership actively engaged in dealing in wool. It was closely affiliated with and assisted in financing the operations of Botany. It also had other investments and dealt in securities. Under the articles of partnership, Eduard and Hans were the active partners and Georg and Max the passive partners. Under the articles, however, no transaction involving more than $25,000 could be entered into without the

consent in writing of all the partners. Max says that this and other provisions of the articles were not observed and that the business was conducted largely as a family affair. The compensation of Eduard was fixed at $3,000 per annum and of Hans at $5,000 per annum, and this provision, it seems, was observed.

Stoehr & Sons (Inc.).

On February 19, 1917, Max Stoehr, Georg Stoehr, Georg G. Roehlig, and Alfred de Liagre united in incorporating a New York corporation under the name of Stoehr & Sons (Inc.). Röhlig was a nephew of Eduard Stoehr and was superintendent and vice treasurer of Botany. He was a native German, but had been a resident of the United States and connected with Botany since 1899. He was a naturalized citizen. De Liagre was executive head of the New York office of Botany and of its general sales department. He was a native German, but had been a resident of the United States and connected with Botany since 1903. He, too, was a naturalized citizen, and had been for many years a close friend of the Stoehr family. The corporation began its existence with the following officers:

Hans Stoehr, president; Röhlig, vice president; Max Stoehr, secretary and treasurer; De Liagre, assistant secretary and assistant treasurer.

Hans did not participate as an incorporator, presumably because he was not an American citizen.

Röhlig and De Liagre had no real interest, and presumably acted to oblige Hans and Max.

The incorporators and Hans Stoehr composed the board of directors. At the first meeting of the board of directors, a letter purporting to be signed by Stoehr & Sons, the partnership (and actually signed by Hans Stoehr in the name of the partnership), was presented to the board, offering to sell and convey to the corporation all of the assets of the partnership, in consideration of the assumption of all of its liabilities and the issuance of all of its stock to the Stoehr family (amounting to $250,000), and in the exact proportion to their respective interests in the partnership. This offer was at once accepted by unanimous action of the full board and a bill of sale signed in the name of the partnership by Hans Stoehr, and reciting the considerations mentioned, was delivered. There is no evidence that Eduard or Georg authorized or had any knowledge of this transaction and this transaction furnishes the only basis for the claim of the corporation to the assets of the partnership. The corporation had no other assets. Stock certificates were thereupon issued in accordance with the proposition of sale, except that the certificates going to Eduard and Georg were issued in favor of Max, with the result that Hans and Max thereby became the holders of record of the entire stock issue. Max thereupon executed a declaration of trust in favor of Eduard as to 1,875 shares and in favor of Georg as to 223 plus shares, these numbers being the numbers going to Eduard and

Georg, respectively, under the proposition of sale. On the same day, Hans and Max transferred the entire 2,500 shares to Hans, Max and Röhlig as voting trustees pursuant to the provisions of a voting trust agreement. Voting trust certificates were then issued to Hans for 357 plus shares, to Max as trustee for 1,875 shares (being Eduard's), to Max as trustee for 223 plus shares (being Georg's), and to Max individually, 44 plus shares. The voting trust was to continue for five years.

The directors of the corporation voted to Hans a salary of $24,000 per annum, plus 6 per cent of profits in lieu of the salary of $5,000 which he received from the partnership, and to Max a salary of $18,000 per annum, plus 5 per cent of profits. Max received no compensation from the partnership. He testified that his brother Hans divided his $5,000 salary with him, and that his father divided his $2,000 salary with Georg.

History of 14,900 shares prior to the sales contract.

The 14,900 shares in question were originally issued to the German company, and were continuously held by it in its own name until 1915. Then, as before stated, 10,000 shares were transferred on the books of Botany to Hans as trustee and the remaining 4,900 shares to Max as trustee. The certificates at the time of the transfer were in Germany and have remained there. The transfer purported to be made pursuant to a special provision of the by-laws. Notwithstanding this transfer, Botany continued to credit on its

books to the German company all dividends on these shares, and actually remitted the dividends to the Germany company until the latter part of 1916, when, by reason of the World War, remittances were no longer possible. The complete beneficial ownership by the German company of these shares was fully recognized by all parties concerned. The by-laws of Botany contained the usual provision for the transfer of shares, and in the same article a special provision for the convenience of European shareholders. This special provision in effect was that certificates might be deposited with the vice treasurer or a director of Botany at Leipzig duly transferred, and that, upon receipt of advice in a prescribed form from such vice treasurer or director that the certificate had been transferred and deposited, the transfer would be noted upon the books of Botany. In this instance Georg, although then in the United States, made the usual certificate of transfer and deposit, and thereupon the transfer above mentioned to Hans and Max as trustees, respectively, was noted on the books of Botany.

SALES CONTRACT.

On February 20, 1917, being the day following the day of incorporation of Stoehr & Sons (Inc.), and the other acts above mentioned, in connection therewith and 17 days after the severance of diplomatic relations with Germany, the "Sales contract" was signed. Before stating the occasion of and circumstances surrounding and following the signing of the sales contract, we give a condensed summary of the

pertinent facts concerning the relations of the Stoehr family to the several corporations involved and to the shares in question:

(1) Stoehr & Sons (Inc.) was 100 per cent the property of the Stoehr family, and 85 per cent belonged to those of the house who were both subjects and residents of Germany (Eduard and Georg). It was completely dominated by Hans. Its organization and history need not be restated.

(2) *Kammgarnspinnerei Stoehr & Co. Aktiengesellschaft.*—This company was founded and all the time since has been largely controlled by Eduard Stoehr and his family. The extent of share ownership of the Stoehr family is not definitely shown by the testimony, but Max owned 600,000 marks out of a total of 12,000,000, and the others of the family each owned much larger amounts. Eduard held a position corresponding to that of chairman of an American board of directors. Georg was one of the executive managers and Hans a member of its directorate.

(3) *Botany Worsted Mills.*—Founded and from the beginning largely controlled directly and indirectly by the Stoehr family. Eduard, Georg, Hans, and Max were all directors. Hans was its treasurer and dominated its affairs. Max was its secretary. Stoehr & Sons (the partnership) owned and Stoehr & Sons (Inc.) claimed as successor of the partnership 5,690 of its shares and the German company owned 14,900 shares which stood in the names of Hans as to 10,000 and Max as to 4,900. Botany

also enjoyed close and active business relations with Stoehr & Sons and the German company.

The principal evidence touching the occasion of and the circumstances surrounding and following the signing of the sales contract are the minutes of Stoehr & Sons (Inc.), the testimony of Max Stoehr, the letters of Hans Stoehr to Heyn & Covington (Rec. 224–226), and the letters of Heyn & Covington to the Alien Property Custodian (pp. 218–219 of the record, approved by both Botany Worsted Mills and Stoehr & Sons (Inc.), Rec. 223). The minutes of Stoehr & Sons (Inc.) (Feb. 20, 1917, pp. 187, 188–189) show the presence of the entire board of directors, Hans presiding and Max acting as secretary. The board at this meeting and apparently by unanimous action authorized the execution of the sales contract by Stoehr & Sons (Inc.), through Röhlig as vice president and Max as secretary. It was evidently contemplated that Hans would sign for the German company, and hence the authorization of the vice president to sign the contract. The testimony of Max is that no one except Mr. Heyn and the members of the board of Stoehr & Sons (Inc.) participated in any way in the negotiations preceding or in the drafting or signing of the sales contract. Heyn was the attorney who incorporated Stoehr & Sons (Inc). He drafted the original articles of partnership of Stoehr & Sons—the partnership—and had been its regular counsel continuously since. He was also and had for some years been the regular counsel for Botany. The German

company had no legal representative and no business representative other than Hans. Max's testimony goes no further (Rec. 113).

The Heyn & Covington letter was written under the following circumstances: In December, 1917, Stoehr & Sons (Inc.) made a report to the Alien Property Custodian, pursuant to the Trading With the Enemy Act, of the beneficial ownership of Eduard and Georg Stoehr in the stock in that corporation before mentioned as going to them but standing in the name of Max. Botany had also reported to the Alien Property Custodian, pursuant to the requirements of the Trading With the Enemy Act, the ownership by sundry alien enemies other than the Stoehrs of 9,510 shares of its capital stock other than the 14,900 shares here involved, and the beneficial ownership on February 3, 1917, by the German Company of the 14,900 shares in question. The Alien Property Custodian (p. 229) wrote to Stoehr & Sons (Inc.) with special reference to those 14,900 shares and requested an explanation. Mr. Heyn and Mr. Lennsen, another attorney, were employed jointly by the board of directors of Stoehr & Sons (Inc.) and Botany to present and explain to the Alien Property Custodian the whole question of alien enemy ownership of shares in both corporations. Accordingly Messrs. Heyn and Lennsen, early in February, went to see Judge Brodhead and Mr. Duvall, representatives of the Alien Property Custodian at Washington. After conference the attorneys were requested to reduce their explanations

to writing. On February 9, 1918, the following letter was accordingly written by Heyn & Covington, with the approval of Mr. Lennsen, to the Alien Property Custodian (Rec. 218):

BOTANY WORSTED MILLS,
STOEHR & SONS (INC.).
ALIEN PROPERTY CUSTODIAN,
Division of Corporations,
Sixteenth and P Streets NW.,
Washington, D. C.

Attention of Judge J. Davis Brodhead and Mr. Andrew B. Duvall.

GENTLEMEN: At the conclusion of our conferences last Wednesday, February 6, 1918, it was arranged that we put in written and summary form the various facts and statements made and hereby take pleasure in doing so.

As to where the control of these companies is.

As will be pointed out hereafter more in detail and as stated by us in our various conferences, considerably more than a majority control of these companies is in alien enemies under the act. The exact figures and stockholdings are stated more at length below.

Botany Worsted Mills of Passaic, N. J.

The Botany Worsted Mills was organized in 1889 under the laws of the State of New Jersey. It was founded by Mr. Eduard Stoehr, of Leipzig, Germany, who is the head of the Stoehr family. He was also the founder of

Stoehr & Co., a German corporation, which had been organized in 1880 and was engaged in Leipzig, Germany, in the manufacture of yarns and textile goods.

By-laws and certificate of incorporation.

We submit herewith a certificate of incorporation of the Botany Worsted Mills; also a copy of its by-laws which have been substantially in this form since its organization, with various amendments as to details, the last amendment having been made in 1913.

Capital stock of Botany Worsted Mills.

Present amount $3,600,000, all common stock, consisting of 36,000 shares; par value $100 each. There have been various increases of the original capital stock (which was $1,100,000) since the organization in 1889, the last increase to the present amount having taken place in 1908.

Botany Worsted Mills is engaged in the manufacture of worsted woolen and other yarn and textile goods. Its plant is situated in Passaic, N. J., and the company has about 6,500 employees.

Number of directors.

The by-laws provide that the number of directors shall not be less than 7 nor more than 11 (by-laws, Art. V, par. 2). The number of directors for any year is determined by the stockholders at their annual meeting (by-laws, Art. V, par. 2). At the March, 1917, meeting they determined that there

should be 10 directors. At the present time there are eight directors, whose names, residences, positions which they now occupy in the company, and the length of time of their connection with the company are as follows:

Present board of directors (eight directors with two vacancies).

Thomas Prehn, of Passaic, N. J., president, connected with the company since 1889.

Hans E. Stoehr, of New York City, treasurer, connected with the company since 1902.

Ferdinand Kuhn, of Bernardsville, N. J., vice president, connected with the company since 1891.

George E. Roehlig, of Passaic, N. J., superintendent and vice treasurer, connected with the company since 1889.

Max W. Stoehr, of Passaic, N. J., secretary, connected with the company since 1903.

Alfred de Liagre, of New York City, executive head of New York office and of the general sales department, connected with the company since 1903.

Otto Kuhn, of Passaic, N. J., head of the woolen department, connected with the company since 1905.

Camille Mehl, of Passaic, N. J., head of the yarn deparment, connected with the company since 1915.

Unusual nature of the directorship of this company.

The nature of the directorship of the company has from the date of its organization been exceptional and different from that of

most American companies in that this company's directors are actively engaged in the business and occupy responsible positions as officers and heads of departments. This has been the policy of the company from the date of its organization, it being the purpose of the founder, Mr. Eduard Stoehr, that the directors should be real directors, actually and personally interested in the business and giving their time and attention to it. The reward of the directors for the success of their work was to be accordingly. It will be noted that the directors in accordance with the provision of the by-laws receive as their compensation a sum equal to 32 per cent of the profits after deducting a 6 per cent dividend to the stockholders, and 5 per cent for reserve (art. 21, par. B, p. 15). This provision of the by-laws has been in force with immaterial variations from the date of the organization of the company in 1889. The variations relate to the percentage, which was 25 per cent, later 40 per cent, and then 32 per cent.

It will be noted that there are now two vacancies in the board. At the annual meeting in March, 1917, 10 directors were elected, being the gentlemen above mentioned and Eduard Stoehr, of Leipzig, Germany, and George Stoehr, of Leipzig, Germany. In the spring of 1917, after the declaration of war, the board, pursuant to Article V, paragraph 6, of the by-laws, declared two directorships vacant because of the disability of Eduard Stoehr and Geo. Stoehr, due to the state of war, and said vacancies have not been filled.

It will also be noted that all of the present directors and officers are residents of the United States.

Annual meeting of Botany.

The annual meeting of the stockholders of the company is held on the third Tuesday of March (Art. XIII, par. 1 of the by-laws), the next annual meeting taking place on March 19, 1918.

Stoehr & Sons (Inc.), New York City.

This is a New York corporation, organized in February, 1917, which is the successor to Stoehr & Sons, a partnership in New York City, which consisted of Eduard Stoehr, of Leipzig, Germany, and his three sons, H. E. Stoehr, of New York City, M. W. Stoehr, of Passaic, N. J., and Geo. Stoehr, of Leipzig, Germany.

Certificate of incorporation and by-laws.

A copy of the certificate of incorporation and of the by-laws of this company are submitted herewith.

Capital stock of Stoehr & Sons (Inc.).

Amount, $250,000, consisting of 2,500 shares, par value $100 each.

The business of the company—like that of its predecessor, the partnership of Stoehr & Sons—is dealing in wool; part of its funds were used to help finance the operations of Botany and it also made investments in other American enterprises.

The immediate occasion for the organization of the corporation in February, 1917, was this: It was assumed that if there was a declaration of war between the United States and Germany, the partnership would probably have to cease, being dissolved by reason of the alien enemy character of Eduard Stoehr, the father, and Geo. Stoehr, the brother, the results of such dissolution being of course obviously unfortunate and conceivably disastrous.

The partners retained the same proportional interest in the corporation as their interest in the partnership, namely, Eduard Stoehr, the father, 1,875 shares, Geo. Stoehr, the brother, 222.21 shares (being represented by trust certificates held by M. W. Stoehr for his father and brother)—in other words, somewhat more than four-fifths interest in parties resident in Germany.

Officers and directors of Stoehr & Sons (Inc.).

The certificate of incorporation and by-laws of the company provide for four directors. They are as follows:

Hans E. Stoehr, president.

Geo. E. Roehlig, vice president.

Max W. Stoehr, secretary and treasurer.

Alfred de Liagre, assistant secretary and assistant treasurer.

It will be noted that these directors and officers are the same gentlemen mentioned above as directors and officers, etc., of the Botany Worsted Mills, and that all of them are residents of the United States.

As has been pointed out, the founder of the Botany Worsted Mills was Eduard Stoehr.

As he is advanced in age (being 72 years) most of the active work during the past years has devolved on his sons. In this connection it may be stated generally that Eduard Stoehr, the father, and Georg Stoehr, the brother, were in charge of the Stoehr interests in Germany, and H. E. Stoehr and M. W. Stoehr of the interests in the United States. H. E. Stoehr represented his father and also Stoehr & Co., the Leipzig corporation, in this country.

Stoehr & Co., the Leipzig corporation, is a German stock company with its plant near Leipzig, Germany. Eduard Stoehr occupied a position similar to that of a chairman of the board of directors and Geo. Stoehr the position of chief executive officer similar to president.

In February, 1917, the board of directors of Stoehr & Co. [the Leipzig corporation] consisted of five members, viz: Eduard Stoehr, Hans E. Stoehr, Dr. Rosenthal, Paul Gulden, and Carl Beckmann.

Details as to stock control of Botany Worsted Mills.

The following will show the stockholdings in Botany Worsted Mills:

Shares of 84 alien enemy stockholders referred to in the list report made to the Alien Property Custodian by Botany Worsted Mills, Form No. 101, report No. 5263 (see typewritten list, schedule 2, showing 10,700 shares in names of alien enemy stockholders from which are to be deducted 1,205 shares referred to as having been purchased and paid for in 1916,

by stockholders resident in the United States), 9,495.

These 1,205 shares were bought and paid for in 1916 by stockholders residents in the United States. But on account of interrupted communication the particulars as to the numbers of the certificates and the names of stockholders are incomplete (see Report No. 5263, last page of Schedule 2).

The above-mentioned 9,495 shares include 2,900 shares of George Hirsch, of Gera, Germany, standing in the name of Thomas Prehn (see report made by Thomas Prehn to the Alien Property Custodian. The report number and trust number of this report we do not know).

The above 9,495 shares also include 1,400 shares of Friedrich Arnold, of Greiz, Germany, standing in the name of Thomas Prehn (see report by Thomas Prehn, No. 3052, trust No. 468).

Shares referred to in report No. 5263 (see last paragraph of typewritten list of Schedule 2, and also report No. 1869, trust No. 4017, Schedule 12, and a copy of contract annexed thereto. See also Schedule 2, last paragraph and Schedule 4 of report No. 5263). These shares were in the name of H. E. Stoehr and M. W. Stoehr, as trustees for said Stoehr & Co., the Leipzig corporation, the beneficial interest being in Stoehr & Co., 14,900.

Regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons (Inc.) from Stoehr & Co., of Leipzig, Germany, it has been fully explained that the control of

Botany might be imperiled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interests (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of the voting right the control of Botany might be lost. This contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Inc., the New York corporation. As we also stated verbally there have been no resolutions or other corporate action by Stoehr & Co., the Leipzig corporation, in confirmationof this transaction.

Additional shares belonging to Stoehr & Sons (Inc.), the New York corporation, 5,685.

Other stockholders in the United States, including the 1,205 shares referred to above, 5,920.

Total stock of Botany, 36,000.

To summarize: While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien enemy interests within the meaning of the Alien Enemy Act; the total of the stock thus controlled (directly and indirectly) being 30,080 shares.

In accordance with the suggestion of Judge Brodhead and Mr. Duvall, we have stated in the foregoing letter the substance of the infor-

mation verbally stated by us and contained in the reports made to the Alien Property Custodian. Of course, if any further information is desired, we shall be glad to furnish it.

As to further conference.

We refer to the suggestion made by Judge Brodhead at our last interview regarding a future conference and shall be pleased to hear from you as to what date will be convenient to your office.

As to the executive committee.

In addition to the foregoing may we take the liberty of calling your attention to Article XXIII of the by-laws of Botany (last page) which provides for an executive committee? Through this committee effective control may be exercised over the affairs of Botany. The number of its members could, if desired, be reduced to three and its powers extended and such other appropriate restrictions adopted as may be deemed advisable.

Yours, very truly,

(Signed) HEYN & COVINGTON,
Counsel.

A carbon copy of the foregoing letter was introduced in evidence bearing the written approval of Stoehr & Sons (Inc.), by Hans, as president, and of Botany Worsted Mills, by Hans, as treasurer. Hans Stoehr also wrote two letters to Mr. Heyn under date of February 5, 1918. These letters were written to Mr. Heyn while he was in Washington for the pur-

poses above stated. One of these letters reads as follows (Rec. 244):

BOTANY WORSTED MILLS,
Passaic, N. J., February 5, 1918.

DEAR MR. HEYN: I wish to thank you for the satisfactory message, which you gave me over the telephone, reporting about your interview at the department of the Alien Property Custodian. I am sorry that the permit for my coming to Washington was not granted. It might have helped to straighten out any questions. At the same time the evidence and information, which you have, may be sufficient to enable you to bring this matter to a satisfactory conclusion.

Herewith I am inclosing another letter, containing the information asked for in regard to the holdings of stock in the Botany Worsted Mills, and Stoehr & Sons (Inc.). In addition I give you a list of the stockholders of the Botany Worsted Mills as follows:

	Shares.	
Stoehr & Co.	14,900	
Hirsch & Arnold	4,100	
Various German stockholders [1]	6,400	
		25,400
Stoehr & Sons	5,685	
Claimed by Prehn and others	1,205	
Various stockholders in U. S. A.	3,710	
		10,600
Total		36,000

I also inclose list of papers mailed to you under separate cover, by registered mail, special delivery.

[1] Including about 1,000 shares of Australian stockholders.

I shall be at the New York office all day to-morrow, Wednesday, February 6, in case you wish additional information.

With kindest regards to both Mr. Lenssen and yourself, I am,

Sincerely, yours,

(Signed) HANS E. STOEHR.

It will be noted that Hans Stoehr, in the foregoing letter, lists the 14,900 shares in question as belonging to *Stoehr & Co.*, and in the group of alien enemy owned shares. The name of "Stoehr & Co." is employed by him as well as by Heyn & Covington in their letter as the name of the German corporation. The full name of that corporation is Kammgarnspinnerei *Stoehr & Co.* Aktiengesellschaft. It will be noted too in the letter of Hans to Heyn, above set out, that he lists Stoehr & Sons as owning only 5,685 shares, and so there can be no doubt of his intention to admit the complete ownership by the German corporation (Stoehr & Co.) of the 14,900 shares. The other letter of Hans Stoehr to Mr. Heyn bears date also of February 5, 1918. It says merely that a majority of the capital stock of Botany Worsted Mills is owned by alien enemies without giving particulars, but the classification in the quoted letter and all the evidence in the record shows that it was impossible for alien enemies to have owned a majority of the shares without including the 14,900 as a part of that ownership.

There is no evidence in the record tending to show any general authority in Hans to sell the stock of the

German corporation in Botany—certainly no specific authority to sell to himself and family (the relation of the family to the several corporations has already been stated) on terms and at a price to be fixed by himself and there is no evidence of ratification or even of knowledge on the part of the German company, although at that time communication with Germany was open, but the messages were required to be in plain language, the use of code words being prohibited. The sales contract was signed on behalf of the German corporations by Hans without official designation.

Acts subsequent to sales contract and connected therewith.

On February 20, 1917, there was noted in the record book of stock transfers kept by Botany, the transfer to Stoehr & Sons (Inc.), of the 14,900 shares in question. No new certificates were issued to Stoehr & Sons (Inc.). This notation was in the usual form prescribed for the transfer of shares of European shareholders by the deposit of duly transferred certificates with an authorized representative of Botany at Leipzig as previously explained. It bears the notation "By deposit of certificates with" (printed) "Georg Stoehr" (rubber stamp). There was no evidence in possession of Botany and there is no evidence in the record of any transfer of these certificates or of any deposit thereof with Georg Stoehr or anyone else. The notation of transfer, so far as the transfer record itself shows, was thus

made in order to appear to be regular and in accordance with the by-laws.

It is the only case in the entire history of the company where such a transfer was noted, with the exception of one other simultaneously made, next to be mentioned, in the absence of a certificate in the prescribed form from a director or the vice treasurer of Botany, resident at Leipzig, that the original certificates duly transferred had been deposited with such officer there. This notation of transfer was made by the custodian of the record book upon the order of Hans Stoehr. Simultaneously the stock standing in the name of Stoehr & Sons, the partnership, was noted as transferred to Stoehr & Sons (Inc.). Certificates for only 1,290 shares were produced. They were the only certificates in the United States. The method of notation was the same as that just explained, but the necessary advice respecting the 4,400 shares in Germany was lacking. This notation was also made upon the order of Hans Stoehr. At the same time there was opened on the books of Botany, and by the direction of Hans, a special account with the German corporation in which it was credited with $5,000, being the consideration recited in the sales contract as paid to the German corporation. A like amount was simultaneously charged on the books of Botany to Stoehr & Sons (Inc.). These entries also were made upon the orders of Hans Stoehr. Shortly thereafter, again upon the orders of Hans Stoehr, a notation was made upon the regular account of the Botany books with Stoehr & Sons,

to the effect that the partnership had become incorporated on February 20, 1917, under the corporate name of Stoehr & Sons (Inc.). On February 20, 1917, an entry was also made on the books of Stoehr & Sons (Inc.) in its current account with Botany, crediting Botany with $5,000 on account of the purchase of the shares of the German corporation. There was no actual payment of the $5,000 recited as a consideration for the sales contract and the book entries mentioned cover all that was done in respect thereof. Stoehr & Sons (Inc.) have continuously since February 20, 1917, and through Hans or Max, voted the 5,690 shares in Botany and continuously through Hans or Max voted the 14,900 shares until they were demanded by the Alien Property Custodian. However, no dividends on those 14,900 shares—and there were two declared after the sales contract and transfer and prior to the demand of the Alien Property Custodian—were paid to Stoehr & Sons (Inc.), but were, under the orders of Hans Stoehr, simply credited and in a special account on the books of Botany to Stoehr & Sons (Inc.). Subsequent to the demand of the Alien Property Custodian they were paid to the Alien Property Custodian.

Financial condition of Stoehr & Sons (Inc.).

After the transaction between the corporation and the partnership respecting the assets and liabilities of the partnership above mentioned, the capital stock of the corporation was $250,000. The assets of the partnership constituted the entire assets of the

corporation. Its balance sheet listed as assets 6,090 shares of Botany at a book value of $975,857 (about $160 per share), but certificates for only 1,290 shares were in this country. It follows that 4,800 shares having a book value of about $775,000 were not available, and presumably a sale of one lot in order to buy another would yield no advantage. The demand liabilities of the corporation at its organization exceeded $1,000,000. Among such liabilities was an indebtedness to the German corporation of about $775,000. Included in this amount was an item for about $270,000 owed by Botany to the German corporation near the end of the year 1916, when further remittances became impossible. This amount, upon the orders of Hans Stoehr, was then transferred on the books of Botany to Stoehr & Sons, the partnership. Stoehr & Sons (Inc.) issued 10-year debentures to the amount of $1,000,000, of which $775,000 were set apart for the German corporation in pretended payment of the indebtedness to it and the balance for Eduard, Georg, Hans, and Max. There is no evidence of authority from the German corporation or from Eduard or Georg Stoehr for this transaction. Eduard and Georg are large creditors, too, and their debts were pretended to be paid by these debentures. It will hereafter appear that the purchase price fixed in the sales contract for the 14,900 shares must have been expected to be, at the time the sales contract was made, in the neighborhood of $5,000,000. It will be urged by the defendants that, at the time the

sales contract was made, Stoehr & Sons (Inc.) was without the ability and without reasonable prospect of ability to pay the purchase price. In this connection it should be noted that Stoehr & Sons (Inc.) made no effort or offer at any time to pay the purchase price or any part thereof, although an installment fell due February 20, 1918—about six weeks prior to the demand for the shares by the Alien Property Custodian and several weeks prior to the installation of directors in Stoehr & Sons (Inc.), who were nominated by the Alien Property Custodian.

The purchase price and value of shares in question.

It will be seen by reference to the sales contract that the purchase price was payable in five annual installments and based upon the book value of the stock at the close of the fiscal year of Botany preceding the due dates plus dividends received prior to the due date on any stock not theretofore paid for. The evidence shows that the book value of the 14,900 shares of Botany at the end of its first fiscal year following the execution of the sales contract (Nov. 30, 1917) was $4,737,957.46. One-fifth of this amount fell due February 20, 1918, and without taking dividends into account was $947,567.49. This book value did not include good will or other like assets. There is no direct evidence regarding the market value or probable value of the shares of Botany, and it will be urged that there is no evidence tending to show that the consummation of the purchase would be in any way advantageous to Stoehr & Sons (Inc.).

Directors of Stoehr & Sons (Inc.) and their action.

Subsequently to the visit of Heyn and Lenssen to Washington, Messrs. Garvan, Wallace, and Duvall were installed as directors in the place of Hans Stoehr (then dead), Rohlig, and De Liagre. Max remained upon the board until October, 1918. Directors nominated by the Alien Property Custodian were also installed in Botany. In both cases the directors were duly installed and the men selected for the service by the Alien Property Custodian were men of high standing in the business world. The original directors of Stoehr & Sons (Inc.) took no action respecting the sales contract subsequent to its authorization on February 20, 1917. When the first installment of the purchase price under the sales contract fell due the original directors were in office and Hans Stoehr was alive (Feb. 20, 1918). The directors nominated by the Alien Property Custodian were installed in March, 1918. Neither have they taken any affirmative action.

Prior to the acceptance of the resignation of Max from the board of Stoehr & Sons (Inc.), possibly in August, 1918, the sales contract was, however, mentioned at a meeting of the board which was attended by Max Stoehr. Mr. Quinn, the counsel of the company, stated that in his opinion the sales contract was without validity and was entered into for the purpose of covering up the real ownership of the stock. He also stated that Stoehr & Sons (Inc.) was without financial ability to perform. No comments were made by Max Stoehr and no appli-

cation was ever made by him or anyone else to the board of Stoehr & Sons (Inc.) to take any action whatsoever respecting the sales contract. He has sought no relief within the corporation before bringing this action. Max says in his testimony that he made no reply to Quinn because he desired to remain upon the board and because his resignation, pursuant to the advice of Heyn, had from the date of the installation of the directors nominated by the Alien Property Custodian been in their hands for acceptance at their will. He says furthermore that Heyn's advice was coupled with the statement that such were the requirements of the Alien Property Custodian and that grave consequences might follow a failure to comply.

Mr. Palmer, the then Alien Property Custodian, testified that the directors nominated by him in this and all other companies were chosen for their experience and ability and that they were free to exercise their business judgment and discretion concerning all matters affecting that interest of the corporations they represented and that he impressed upon them the fact that he looked to them to perform their duties fully and freely. He says that he would have expected the directors nominated by him in Stoehr & Sons (Inc.) to take such action as they might deem proper respecting the enforcement of the sales contract in the event it was their judgment that it was proper and right to do so. The directors were James N. Wallace, president of the Union Central Trust Co., a man of large affairs and high standing; Francis

P. Garvan, then Chief of the Bureau of Investigation of the Alien Property Custodian and now Alien Property Custodian; and Andrew B. Duvall, then of the office of the Alien Property Custodian.

Seizure of shares in question by Alien Property Custodian.

The shares in question were originally demanded or seized by the Alien Property Custodian under date of April 5, 1918. They were again demanded and seized under date of February —, 1919, pursuant to the amendment to the Trading With the Enemy Act of November 4, 1918. Stock certificates were issued to the Alien Property Custodian subsequent and pursuant to the demand of February, 1919, in accordance with the requirements of the amendment of November 4, 1918, and they are now in possession of the Alien Property Custodian.

Threatened sale of shares.

At the time this suit was instituted the Alien Property Custodian had advertised for sale 24,410 shares as belonging to alien enemies, being the 14,900 shares in question and 9,510 belonging to miscellaneous alien enemies. There were 1,290 additional shares advertised to be sold at the same time and price as the property of Stoehr & Sons (Inc.). These 1,290 shares were offered at the request of the directors of Stoehr & Sons (Inc.), and were all the shares claimed by Stoehr & Sons (Inc.) for which there were certificates in the United States.

Point I.

The Act of Congress, known as the Trading With the Enemy Act, was passed under the express power given to Congress by section 8 of Article I of the Constitution.

By that Act Congress was given express power to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," and to make all rules which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

To carry out this express power and to make the rules concerning "captures on land and water," the Trading With the Enemy Act was passed. That Act provides in section 7–a that every corporation incorporated in the United States issuing the shares or certificates representing beneficial interests shall transmit to the Alien Property Custodian a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation has reasonable cause to believe to be, an enemy or ally of an enemy, resident within the territory or a subject or citizen residing outside of the United States, or any nation with which the United States is at war. The President may also require a similar list to be transmitted of all stock or shares owned on February 3, 1917, by any person now defined as an enemy or ally of an enemy, or in which any such person has any interest, and that any per-

son in the United States who holds, or has or shall hold or have, custody or control of any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of an enemy, or of any person with whom he may have reasonable cause to believe to be an enemy or ally of an enemy, to report the fact to the Alien Property Custodian by written statement, under oath, containing such particulars as such custodian shall require. The section further provides that an enemy or ally of an enemy may defend by counsel any suit in equity or action at law which may be brought against him.

Subdivision c of this section provides that if the President shall so require, any money, or other property owing or belonging to, or held for, by, or on account of, or on behalf of, or for the benefit of an enemy, or ally of an enemy, which the President after investigation shall determine is so belonging or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian.

Subdivision e further provides that no person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

By section 8 of Article I of the Constitution, Congress is given express power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. Captures on land and water were thus treated as part of the

power to declare war, part of the war power vested in Congress, and Congress was expressly given power to make all laws which shall be necessary and proper to carry into execution the foregoing powers. Any rules of law that Congress might make concerning captures on land and water were within the express power granted to Congress. Whether Congress should declare proceedings *in rem* should be instituted in the name of the United States in any District Court of the United States, or should declare that the President should seize the property of enemies within the territory of the United States and hold the same, or the proceeds thereof, as Congress should afterwards provide, was within the discretion of Congress; and the provision in the law, section 9 of the Act, which allows a person claiming to own property to claim it from the President and to bring an action in the courts of the United States for its recovery, was entirely within the discretion of Congress, and not outside of the power granted to Congress to make rules concerning captures on land and water.

During the late rebellion Congress passed an Act on August 6, 1861, c. 60 (12 Stat. 319) which was entitled "An Act to confiscate property used for insurrectionary purposes." The fifth section of that Act provides that to insure a speedy determination of the "present rebellion it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to

apply and use the same, and the proceeds thereof, for the support of the Army of the United States." The Act further provides that to secure the condemnation and sale of any such property after the same shall have been seized, proceedings *in rem* should be instituted in the name of the United States in any District Court thereof, or in any Territorial Court. That question came before this court in the case of *Miller* v. *United States* (11 Wall. 268, at p. 296). There the court say:

> It [the Act of Congress] contemplated that every kind of property mentioned could be seized effectually in some mode. It had in view not only tangible property, but that which is in action. It named stocks and credits; but it gave no directions respecting the mode of seizure. It is, therefore, a fair conclusion that the mode was intended to be such as is adapted to the nature of the property directed to be seized, and in use in courts of revenue and admiralty. The modes of seizure must vary.

The court then proceeded at page 304 to consider the objection on behalf of the plaintiff in error that the Act of Congress under which the proceedings to confiscate the stock had been taken were not warranted by the Constitution and were in conflict with some of its provisions and the court held that, if they were an exercise of the war powers of the Government, it is clear that they were not affected by the restrictions imposed by the Fifth and Sixth Amendments; that the question was,

therefore, whether the action of Congress was a legitimate exercise of the war power. And the court, after referring to the power, says (p. 305):

> Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water. * * * It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter

> what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

The court then determined the question as to whether the Acts of 1861 and 1862 were an exercise of this war power—the power of confiscation—or whether they must be regarded as mere municipal regulations for the punishment of crime.

In the *Selective Draft cases* (245 U. S. 366) the court had before it the provision of an Act of May 17, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States." It is there said, at page 377:

> But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. Article VI. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several States.

And this decision was reaffirmed in *Cox* v. *Wood* (247 U. S. p. 3). It is said in that case (p. 6):

> (*a*) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (*b*) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (*c*) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia found in the Constitution.

Applying the principles thus established, the Constitution having delegated the power to make rules concerning captures on land and water, any act that the Congress passes which is reasonable and proper to accomplish that purpose and has to do with captures of enemy property on land or water as part of the war power was within the constitutional power of Congress.

The Act in question authorized the custodian, an officer of the United States, to take into his pos-

session and control all property owned by enemies and provides a method by which he shall determine the property which is thus enemy owned and which he is required to take into his possession. The rules adopted by Congress for the determination of that question are clearly within the constitutional powers vested in Congress by the provision in question. The Act by section 9 provides that when any property thus taken into the custody of the custodian that is claimed by a person not an enemy, such person may prosecute an action in the United States District Court to recover possession of the property for which claim is made, and the custodian shall then keep the property as it is in existence at the time the action was commenced and respond to any judgment of the court which determines its ownership. Here is a perfect protection for every one who claims an interest in property owned by an enemy, and it provides for a judicial determination of that action and provides for any person claiming the property "due process of law." The Act also provides that the custodian may sell the property and the proceeds, when deposited in the Treasury of the United States, shall stand in place of the property thus sold, and the custodian proceeded to carry out this provision of the statute by advertising the property for sale. But when the action was commenced the custodian voluntarily refrained from making a sale, and the stock claimed by this appellant is now in the possession of the custodian awaiting the decision of this court.

The question as to the constitutionality of the power of Congress to declare a sale of property claimed by citizens of the United States is not therefore involved. The Act does not itself attempt to determine the rights of a claimant of the property. It provides for the custody of the property and authorizes the custodian to take into his possession any property that he determines is enemy-owned. This power is clearly within the power of Congress, and this power is the only power that the custodian has exercised in this case.

It is the *custody* of the property that is provided for, and the statute provides that any person in the United States who holds or has, or shall hold or have custody or control of any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of an enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of an enemy, shall report the fact to the Alien Property Custodian, and if the President shall require any money or other property owing or belonging to, or held for, by or on account of, or on behalf of an enemy or ally of an enemy, not holding a license, which the President after investigation shall determine is so owing or so belongs, or is so held, shall convey, assign, transfer, and deliver or pay it over to the Alien Property Custodian. The property of the enemy having been delivered to the custodian, the Act then provides by section 9 the method by which a person not an enemy or ally of an enemy shall establish his claim to the property. This *cus-*

tody in the Alien Property Custodian is no more than the marshal has under a writ of attachment, or a receiver in an action for the foreclosure of a lien, or any other legal proceeding by which the court takes into its possession the property involved in the suit, which is to be determined by the final judgment in the action.

Provision is made by section 9 for the asserting of any claim by any person not an enemy or ally of an enemy to recover possession of the property. In the action in which the appellant filed his bill the judgment that he asked for was that the property be declared not to be the property of an enemy or ally of an enemy, but that it be decreed that the defendant A. Mitchell Palmer, as Alien Property Custodian, be ordered, adjudged and decreed to release and surrender all and singular the shares of stock of the defendant Botany Worsted Mills owned by the defendant Stoehr & Sons (Inc.), seized and taken by him as aforesaid, and to account for his acts in and about his attempted possession and control of such shares of stock and in and about the care and conduct of said property, business, and affairs of the said defendant corporation during the period of his possession thereof. (Rec. 13.)

The appellant Stoehr & Sons (Inc.), thus has had its day in court, and has been permitted to, and did, offer such evidence as it had to prove its claim that the property thus taken into the custody of the Alien Property Custodian was not the property of an

enemy or ally of an enemy, but was the property of a New York corporation.

Such an action is provided for by section 9 of the Act. That provides that any person not an enemy or ally of an enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian thereunder, and held by him, or by the Treasurer of the United States, may file with the said custodian a notice of claim, under oath, and in such form, and containing such particulars as said custodian shall require, and that the President, if application be made therefor by the claimant, may, with the consent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment, or delivery by said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, of the interest therein to which the President shall determine such claimant is entitled. Provided that no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant, to establish any right, title, or interest which he may have in such money or other property; that if the President shall not so order, within 60 days after the filing of such application, or, if the claimant shall have filed a notice as above required and shall have made no application to the President, such claimant may, at any time before the expiration of six months after

the end of the war, institute a suit in equity in the District Court of the United States for the district in which such claimant resides, or if a corporation, where it has its principal place of business, to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant, to establish the right, interest, title, or debt so claimed, and if suit shall be so instituted, then the money or other property of the enemy or ally of the enemy against whom such interest, right, or title is asserted or debt claimed, shall be retained in the custody of the Alien Property Custodian or in the Treasury of the United States as provided in the Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States, or order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated; and except as therein provided the money or other property conveyed, transferred or delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

The *custody* by the Alien Property Custodian did not deprive the New York corporation of property without due process of law, as provided for by the Fifth Amendment to the Constitution. It is provided that after investigation as to whether the

property is owned by an enemy or ally of an enemy, or whether an enemy or ally of an enemy has a beneficial interest therein, if the President determine that it is, then the Alien Property Custodian is to take it into his custody, and any person not an enemy or ally of an enemy has full power and authority to sue for and recover such property by an action provided for by section 9 of the Act.

The appellant herein commenced such an action and the property has remained in the hands of the custodian since the action was commenced. He had full liberty to assert his claim and prove that the corporation had been deprived of its property without due process of law. This is an entirely reasonable Act and was passed under the express power given to Congress concerning captures on land and water, by section 8 of Article I of the Constitution. And there having been an express grant of power to Congress—the power to make rules concerning captures on land and water—any rule or Act of Congress which is reasonable to accomplish that purpose is within the express power of Congress granted by this provision. It is under the power vested in Congress for the efficient prosecution of the war that this Act was passed. It was to effectuate the capture of all enemy property in the United States and confiscate it to the United States that Congress considered the provisions of this Act necessary to accomplish that purpose.

This court has sustained the action of Congress in passing the Selective Draft Law (245 U. S. 366);

the Espionage Act (*Schenck* v. *United States*, 249 U. S. 47; *Schaefer* v. *United States*, 251 U. S. 466); the Federal control of railroads (*Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, and in *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163); to the United States taking possession of the cable lines (*Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Dakota Central Telephone Co.* v. *State of South Dakota*, 250 U. S. 163); the War Time Prohibition Act (*Hamilton, Collector of Internal Revenue* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146).

Under this statue it is made the duty of every custodian of enemy-owned property to report it to the Alien Property Custodian. It is on that report that the custodian acts in determining what is enemy-owned property. In this case the corporation which the appellant claims has the title to the property was notified and appeared before the Alien Property Custodian, and submitted its claim, and the facts upon which it was based. The custodian determined that the property was owned by an enemy and took it into his possession, and then the complainant filed this bill to obtain possession of the property.

The appellant, as we understand, did not claim in the court below that the whole Trading With the Enemy Act is unconstitutional, but only claimed that the President's determination as to the right of the appellant, or Stoehr & Sons (Inc.) to recover these shares of the Botany Worsted Mills was not conclusive upon Stoehr & Sons (Inc.) and was a violation of

the Federal Constitution. But nowhere in the court below did the appellants make any such claim. The appellant filed his claim with the Alien Property Custodian under section 9 of the Trading With the Enemy Act. That claim is annexed to the bill as Exhibit 3 (printed at p. 18), and after the bill had been filed he filed another claim with the Alien Property Custodian, which was entitled "Notice of claim," pursuant to section 9 of the Trading With the Enemy Act, and that was annexed to the supplemental bill and is printed at page 22 of the record. That claim not having been complied with, he filed this bill alleging the ownership of the stock by Stoehr & Sons (Inc.), a New York corporation. So, therefore, so far as the appellant objects to the constitutionality of the provisions of the Trading With the Enemy Act, those provisions were never claimed by the appellant or sought to be enforced by the court. The appellant sought his remedy under the Trading With the Enemy Act. He filed a claim with the Alien Property Custodian and filed his bill in the United States Court, as provided for by that Act. His whole claim in the court below, and in this court, is that he is proceeding under that Act and is entitled to have the judgment of the court in his favor, because of the provisions of the Act. So he certainly can not claim that the Act is unconstitutional and void and yet get a judgment under the Act adjudicating that the shares of stock in question are the property of the New York corporation. He had an election to sue for the property on the ground that the taking of it

was unlawful, because the custodian was not authorized by any valid law of the United States to take possession of the property; or he had an election to proceed under the Act, make a claim against the custodian under the Act, and when that claim was not complied with to file a bill under section 9 of the Act to recover possession of the property.

These are inconsistent remedies, and an election to claim under the Act would defeat his claim if the Act were absolutely void. As he filed his claim under the Act, and filed the bill under the Act, and sought to procure an adjudication in the court below, as provided for by the Act, the only relief that he can get in this suit is that provided for by the Act, and if his action was not sustainable under the Act, the bill was properly dismissed.

In the assignment of errors by the appellant (p. 321), by the first assignment it is alleged that the court erred in refusing to hold that the Act of Congress known as the Trading With the Enemy Act, approved October 6, 1917, and the amendments thereto approved March 28, 1918, and November 12, 1918, in so far as the same undertook to permit the seizure of the property of Stoehr & Sons (Inc.), a New York corporation *ex parte* and without affording to it a hearing or an opportunity to be heard, and in so far as they confer upon the Alien Property Custodian the right to sell the property so seized without proceeding before a judicial tribunal, are unconstitutional. By the second assignment of error, that the court erred in refusing to hold that in so far as the Alien

Property Custodian undertoook, *ex parte* and without legal proceeding, based upon notice of hearing or an opportunity to be heard in court, to take possession of the shares of stock of the Botany Worsted Mills belonging to Stoehr & Sons (Inc.), and to determine that such shares belonged to the Leipzig corporation, or any other enemy, his action was null and void, and in violation of the due process clause of the Constitution of the United States.

There is, therefore, no claim, either in the court below, or on the assignments of error, that the mere taking and custody were a violation of the constitutional rights of either the appellant or the New York corporation. It appears by the record that the appellant and the corporation whose rights he seeks to enforce, had notice and made a report to the Alien Property Custodian as to the status of these shares. He was heard by the custodian, and it was after such hearing that the custodian took possession of the property. He then proceeded under the Act to file a claim for the property, and filed this bill in the United States District Court, and the court did not hold that any action of the custodian, or any determination of his, was a conclusive adjudication as to the title or interest of Stoehr & Sons (Inc.), a New York corporation, to the stock in question.

So it is submitted that there is no constitutional question submitted on this appeal. The rights of the appellant and the corporation which he assumes to represent were determined by the judgment from which this appeal is taken, and all of the testi-

mony that was produced on the trial as to the title of the New York corporation to the stock in question shows that the only substantial question presented on this appeal is whether the appellant proved that the stock in question was the property of the New York corporation, and whether the New York corporation has a right to a judgment transferring the stock to it under section 9 of the Trading With the Enemy Act.

In the brief filed by the appellant in the court below the only question as to the constitutionality of the Trading With the Enemy Act is contained in the sixth, seventh, and eighth points. The fifth point is that, in so far as the Alien Property Custodian undertook, ex parte and without legal proceeding based upon notice of hearing or an opportunity to be heard in court, to take possession of the shares of stock of the Botany Worsted Mills belonging to Stoehr & Sons (Inc.) and to determine that such shares belonged to the Leipzig company, or any other enemy, his action was null and void and in violation of the due process clause of the Constitution.

As we have before indicated, Stoehr & Sons (Inc.) had notice before the determination of the Alien Property Custodian and submitted its claim to him, and his determination only resulted in the custody of the property, the ownership of which was subsequently claimed by the New York corporation in an action in this court under the Trading With the Enemy Act.

The seventh point is that the contention that the Trading With the Enemy Act divested the title of the New York company under its contract of February

20, 1917, is untenable, on the ground that if that interpretation can be given to the Act the Act constitutes a deprivation of property without due process of law; and point eight contends that the intended sale of the shares of stock belonging to Stoehr & Sons (Inc.), in the absence of an adjudication in a proceeding duly instituted in accordance with due process, would be a violation of this constitutional right.

It was not claimed in the court below, nor is it claimed here, that anything in the Trading With the Enemy Act divested the New York corporation of its rights in these 14,900 shares of the Botany Worsted Mills Co. What is contended here is that the Act divested the Leipzig corporation and the members of the Stoehr copartnership, who were German citizens and residents of Germany, of their legal or beneficial interest in these 14,900 shares of stock, and that Stoehr & Sons (Inc.), the New York corporation, had no legal title to the stock and had no beneficial ownership in it, and therefore the New York corporation was not entitled to recover the stock from the Alien Property Custodian. No constitutional rights of the New York corporation, or of the plaintiff as a stockholder in that corporation, have been impaired, or title to the stock divested by any adjudication, except the judgment now before the court, and by this judgment it is determined that Stoehr & Sons (Inc.), the New York corporation, had no title to, or beneficial interest in, this stock, and on that finding the bill was dismissed.

POINT II.

The right of the United States to confiscate and capture enemy property in the United States is not presented on this appeal, but the Constitution expressly gives to Congress, by section 8 of Article I, the power to declare war and make rules concerning captures on land and water, and also the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and the Trading With the Enemy Act, so far as it provides for the capture and sequestration of all property of enemies, is a valid exercise of that power.

The power of the United States to capture enemy property within the United States is settled.

Miller v. *United States*, 11 Wallace, 268, at p. 304.

Tyler v. *Defrees*, 11 Wallace, p. 331.

And that does not seem to be disputed by the appellant.

The following propositions have been established:

First, by the law of nations war in and of itself invests every nation with full right to take and confiscate the property of his enemy wherever found.

The Sally, 8 Cranch, 382.
Brown v. *United States*, 8 Cranch, 110.
Miller v. *United States*, 11 Wall. 268.

Second, the individuals who compose a belligerent State are one with it and are conclusively regarded as the enemies of its opponent. Their property is to be considered as the property of the nation. It belongs in legal contemplation to the State from the right which the State has over the property of its

citizens, and from the fact that it constitutes a part of its riches and augments its power.

The Rapid, 8 Cranch, 155.
The Venus, 8 Cranch, 253.

Third, whether the right of capture and confiscation shall be exercised, and if so by what agency and to what extent, rests with the soverign and is a matter of internal policy. In the case of the United States the power to determine this question of policy—"to make rules respecting captures on land and water"—is vested in Congress. *Brown* v. *United States*, 8 Cranch, 110.

Point III.

Under the Trading With the Enemy Act the Alien Property Custodian acquired all enemy interest in and right to the 14,900 shares of the Botany Worsted Mills, either legal or equitable, and all beneficial interests in such stock or right to enforce any right to it.

By subdivision c of section 7, it is expressly provided that if the President shall so require, any money or other property owing or belonging to, or held for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of an enemy, not holding a license granted by the President, which the President after investigation shall determine is so owing, or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered and paid over to the Alien Property Custodian.

By section 12 of the Act, as amended on March 28, 1918 (40 Stat. 459, 460), it is provided that all other

property of an enemy or ally of an enemy, conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, shall be safely held and administered by him, except as thereinafter provided; that the Alien Property Custodian shall be vested with all the powers of a common law trustee in respect to all property, other than money, which shall come into his possession in pursuance of the provisions of the Act, and in addition thereto, and acting under the supervision and direction of the President and under such rules and regulations as the President shall prescribe, may manage such property and do any act or thing in respect thereto, or make any disposition thereof, or of any part thereof, by sale or otherwise, and exercise any right which may be or become appurtenant thereto, or to the ownership thereof, in like manner as though he were the absolute owner thereof.

By an amendment approved November 4, 1918 (40 Stat. 1020), subdivision c of section 7 of the Trading With the Enemy Act was amended by providing that whenever such property shall consist of shares of stock or other beneficial interests in other corporations, associations, or companies, or trusts, it shall be the duty of the corporation, association or company or trustee or trustees issuing such shares, or any certificates or other instruments representing the same, or any other beneficial interest, to cancel upon its, his, or their books all stock or other beneficial interests standing upon its, his, or their books, in the name of any such person or persons, or held for or on account

of, or on behalf of, or for the benefit of any such corporation or person. The sole relief and remedy of any person having any claim or any money or other property, conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of the Act.

Under this Act the Alien Property Custodian demanded of the Botany Worsted Mills the transfer to him of these 14,900 shares of stock, having after investigation determined that Eduard Stoehr and Georg Stoehr were enemy aliens, and that the Leipzig eorporation, of Leipzig, Germany, was an enemy not holding a license granted by the President and by that demand the Alien Property Custodian seized every such right, privilege, and benefit created in favor of, and granted to, said enemy by said contract, including every power and authority thereover which might or could be exercised by said enemy. (Demand dated the 26th of February, 1919, p. 271 of the record.)

By other demands the Alien Property Custodian took into his possession 14,900 shares of the stock of the Botany Worsted Mills standing in the name of, or the beneficial interest in which vested in, the Leipzig corporation. (Demand April 5, 1918, pp. 202 to 205 of the record.)

By similar demand the Alien Property Custodian took into his possession all of the interest of the German enemy aliens in the stock of Stoehr & Sons (Inc.).

(Demand printed at pp. 258, 259, and 260 of the record.)

And by another demand he made demand for al money and property mentioned and described in the report made by the complainant on December 3, 1917, as owing or belonging to, or held for, by or on account of, or on behalf of, or for the benefit of, George Stoehr, of Leipzig, Germany. And by another demand (printed at pp. 264 and 265 of the record) demand was made for the capital stock of Stoehr & Sons (Inc.) standing in the name of the complainant as trustee for Eduard Stoehr, of Leipzig, Germany, and George Stoehr, of Leipzig, Germany. By another demand made by the Alien Property Custodian (printed at p. 267 of the record) demand was made for the stock owned by these two German enemies in Stoehr & Sons (Inc.). By another demand (printed at p. 269) he demanded all interest in Stoehr & Sons (Inc.) in all the property of the copartnership of Stoehr & Sons (demand printed p. 269.)

All of this stock was transferred to the Alien Property Custodian and is now in his possession. Thus all interest of every description, beneficial or otherwise, or in trust for the German enemies, was confiscated by the United States and taken into its possession. All right to enforce the contract in relation to these 14,900 shares was confiscated to the United States and was taken into the possession of the Alien Property Custodian. All right to enforce any contract in relation to these shares of stock became vested in the United States. Thus

any right of the Leipzig corporation in and to the 14,900 shares of stock of the Botany Worsted Mills had become the property of the United States, and under the Trading With the Enemy Act the custodian was, by subdivision c of section 7, as amended November 4, 1918, authorized to have such stock transferred to him, representing the United States, and the sole relief and remedy of any person having any claim to any money or other property theretofore or thereafter conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian, or required so to be, or seized by him, is that provided for by the terms of that Act.

The custodian had determined that the property was the property of the Leipzig corporation, after notice to, and report by the officers of Stoehr & Sons (Inc.), and based upon the report made by that corporation to the Alien Property Custodian, and by the Act itself, anyone claiming ownership to that stock, had to proceed under the Act to assert its claim or right by the action provided for by section 9 of the Act.

Point IV.

Under the contract on which this claim is based (which is annexed to the bill as Exhibit 1, printed at page 14 of the record), Stoehr & Sons (Inc.), a New York corporation, never acquired either the legal title, or the beneficial ownership, of the 14,900 shares of stock of the Botany Worsted Mills.

Prior to the 20th day of February, 1917, it is conceded that the Kammgarnspinnerei Stoehr & Co.

Aktiengesellschaft, herein called the Leipzig corporation, was the owner of these 14,900 shares of the stock of the Botany Worsted Mills. Prior to 1915 these shares stood on the books of the Botany Worsted Mills corporation in the name of the Leipzig corporation. In 1915 these shares of stock were caused to be transferred on the books of the Botany Worsted Mills, 10,000 to Hans E. Stoehr, as trustee, and 4,900 to Max W. Stoehr, as trustee, but the complete beneficial interest therein remained in the German company. The war between Great Britain and France and the German Empire, then existing, it was feared that the voting right to this stock would be interfered with if it continued in the name of the Leipzig corporation, and it was therefore transferred to these trustees, in order to enable them to vote at the annual meeting of the corporation. After the severance of diplomatic relations between the United States and Germany, in February, 1917, and in contemplation of the declaration of war between the United States and Germany, Stoehr & Sons (Inc.) was organized under the laws of the State of New York, and all interest of the copartnership theretofore existing was transferred to this corporation.

Immediately thereafter, and on February 20, 1917, an instrument was prepared, which purported to be a contract between the Leipzig company and the New York corporation, relating to these 14,900 shares of stock of the Botany Worsted Mills. That instrument was in the form of an agreement made between the Leipzig corporation of the first part, and Stoehr &

Sons (Inc.), a New York corporation, party of the second part. The trustees in whose name this stock was held on the books of the Botany Worsted Mills, was not a party to that agreement. The agreement witnesseth that the Leipzig corporation was beneficially interested in 14,900 shares of the capital stock of the Botany Worsted Mills, which said shares of stock stood in the names of Hans E. Stoehr and Max W. Stoehr and were represented by certain certificates (giving their numbers); and that whereas the Leipzig corporation was desirous of selling and the said New York corporation was desirous of purchasing said interest on the terms and conditions therein set forth, the instrument provides that in consideration of the premises and of $5,000 paid by the New York company to the Leipzig company on account of the purchase price, first, that the Leipzig company sold, assigned, and transferred unto the New York company all of its interest in said shares, and that said shares of stock should be forthwith transferred upon the books of the Botany Worsted Mills and placed in the name of said New York company. By the second clause of the instrument the terms of the sale and the purchase price for said shares were to be determined as set forth, and paid in installments. It is there provided that the purchase price shall be determined by, and shall be equal to, the book value of said shares, as shown by the books of the Botany Worsted Mills, the price to be payable in five installments, the first installment to be payable one year from date and the subsequent installments in two, three, four, and

five years from date, and from the last or fifth installment, the sum of $5,000, paid on account as thereinbefore recited, with interest at 6 per cent from date, shall be deducted.

The instrument then recites how the annual installments shall be completed, and then provision is made for the dividends declared upon the Botany Worsted Mills stock during the period. It is then by the third clause provided that the certificates of stock for said 14,900 shares, sold and transferred as thereinbefore provided, shall be placed in the possession of the Leipzig company as collateral security for the amount of the purchase price, but as each annual installment, with said additions provided for, is paid, the New York company shall have the right to require the delivery, and the Leipzig corporation will contemporaneously with the payment of such installment, redeliver to the New York company, one-fifth of the said shares, and thereupon the Leipzig company shall continue to retain the remaining shares as collateral security for the balance of the purchase price still payable. By the fifth clause of the instrument, it is provided that in the event that any of the said annual installments with such additions provided for in paragraph second, subdivision d, thereof, shall not be paid when due, then the Leipzig company shall notify the New York company in writing that it requires the payment of the installment then due, together with said additions, or in the event that the New York company shall

not within 60 days after said demand, pay said installments with the additions, then the—

> said shares of stock or any remaining balance of said stock shall be forthwith retransferred to the said Leipzig company on the books of the Botany Worsted Mills and all rights on the part of the New Jersey company to said stock or any such balance shall cease and the Leipzig Company shall retain the five thousand ($5,000) dollars, paid on account as hereinbefore recited, in full settlement of any claim against the New York company, and thereupon neither of said companies shall have any further claim against the other arising under or by reason of this agreement; it being understood that the nonpayment of any subsequent installment shall not affect the portion or portions of the stock which may have been fully paid for by a previous installment or installments. (Rec., p. 16.)

This instrument was signed in the name of the Leipzig company by Hans E. Stoehr. It was signed by Stoehr & Sons (Inc.) by George G. Röhlig, vice president, and by the appellant as secretary of the New York corporation. Within a short time after this instrument was signed war was declared between the United States and the Empire of Germany, and thereafter nothing was done under this instrument. Hans E. Stoehr at the time of the execution of the instrument was the president of the New York corporation. He was in control of both the copartner-

ship theretofore existing of Stoehr & Sons, and the corporation of Stoehr & Sons, after it was incorporated, and the Botany Worsted Mills, of which he was a director and treasurer (p. 219). He did not sign this instrument as an officer of the Leipzig corporation, nor as agent for the Leipzig corporation or in any other capacity, but just signed the name of the Leipzig corporation by Hans E. Stoehr. The Leipzig corporation, as before mentioned, was a large corporation existing in Germany. Its stock was bought and sold on the Leipzig and Berlin Stock Exchange, and it had many stockholders beside the Stoehr family. It will be noted in this instrument that nowhere does Stoehr & Son (Inc.), the New York corporation, agree to buy the shares—except the transfer of the shares—or agree to be responsible for any obligation under it. The $5,000 provided for in the agreement was never paid to the Leipzig corporation. Hans E. Stoehr simply directed that a credit be made to the Leipzig corporation, and a charge be made against Stoehr & Sons (Inc.) on the books of the Botany Worsted Mills. No money was passed; no money was received by the Leipzig corporation.

So far as appears, the Leipzig corporation had no knowledge of this transaction. And then to prevent their being any implication of any liability of Stoehr & Sons (Inc.), the New York corporation, it is expressly provided that the price to be payable shall be paid in five installments, the first installment one year from date, and the subsequent installments two, three, four, and five years from date; and then it is

provided by a clause in the instrument that if the New York company should not pay any of the installments within 60 days after demand, then the shares of stock, or any remaining balance of said stock, shall be forthwith retransferred to the Leipzig company on the books of the Botany Worsted Mills, and that all rights on the part of the New York company to said stock, or any balance, shall cease. The Leipzig company was to have the certificates in its possession and on failure to pay any installment all rights of the New York company were to cease, and thereafter the Leipzig company was to have no further claim against the New York company. There was to be no reassignment by the New York company to the Leipzig company, which would be necessary if the title had passed by the first clause of the instrument. But all rights of the New York company were to cease. This language would be entirely intelligible if it were an option to purchase by the New York company one-fifth of the stock at each of the periods named. But taking the whole instrument together, as the court held on the trial, there was no intention to transfer the title to the stock to the New York company until the installment was paid. The formal title on the books of the Botany Worsted Mills was to be transferred to the New York corporation. But the Leipzig corporation was to hold the certificates of stock, and if the installments were not paid the rights of the New York corporation to said stock were to cease.

As a matter of fact, all these certificates were in Germany, and were never produced or canceled by the Botany Worsted Mills, and there could be no legal transfer on the books of the Botany Worsted Mills to the New York corporation. But Hans E. Stoehr, in control of all three corporations, ordered that these shares of stock should be transferred on the books of the company to Stoehr & Sons (Inc.), a New York corporation, but no certificates were ever issued to Stoehr & Sons, and there was a mere book-keeping entry. So far as appears, the Leipzig corporation knew nothing about this whole transaction, which was a transfer of its stock to a corporation of which Hans E. Stoehr was president, and in which he and his father and brothers were solely interested.

The by-laws of the Botany Worsted Mills were introduced in evidence and the provision in regard to the transfer of shares is printed at page 250, article 18. That provides that stock shall be transferable only upon the books of the company by the holder thereof in person or by his duly authorized attorney; that the holder of record of stock upon the books of the company shall be the only person whom the company shall recognize as the owner thereof. But the certificates of stock never having been delivered to the Botany Worsted Mills, and there was no action by the Leipzig company or by its attorney, there could be no valid issue of new certificates without creating an overissue of stock, and a mere notation on the books of the company that such stock had

been transferred to Stoehr & Sons (Inc.) would not make it the lawful owner of the stock or entitle it (the New York corporation) to receive the dividends or act as stockholder of the company, and the dividends subsequently paid by the Botany Worsted Mills were never paid to Stoehr & Sons (Inc.).

When this transaction was inquired into by the Alien Property Custodian, Stoehr & Sons and the Botany Worsted Mills made a report to the Alien Property Custodian. This is printed on pages 218 to 223 of the record. When these corporations reported the stockholdings of the Botany Worsted Mills (p. 221 of the record), this contract was alluded to (p. 222). It is there said that these 14,900 shares were in the name of H. E. Stoehr and M. W. Stoehr as trustee for said Stoehr & Co., the Leipzig corporation, the beneficial interest being in Stoehr & Sons; that regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons (Inc.), from Stoehr & Co. of Leipzig, Germany, it has been fully explained that the control of Botany might be imperiled by a state of war, because the voting right on stock of alien enemies, or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares), was doubtful under the decisions of the courts, and if deprived of the voting right the control of Botany might be lost; that the contract was made with reference to the control of Botany as between its stockholders and had, of course, no reference to the status of such control as far as the Alien Property

Custodian was concerned; that such status is not affected whether such shares are in Stoehr & Sons, the Leipzig corporation, or in Stoehr & Sons (Inc.), the New York corporation; that as before stated verbally there had been no resolution or other corporate action by Stoehr & Sons, the Leipzig corporation, in confirmation of this transaction. This report is signed by Heyn & Covington, counsel, but at the foot of the carbon copy of this report there is a formal approval of this report by Botany Worsted Mills, by Hans E. Stoehr, treasurer, and Stoehr & Sons (Inc.), by H. E. Stoehr, president.

This report is dated February 9, 1918, less than a year after the corporation was organized and the instrument in question was made. It was made under the direction of Hans E. Stoehr, who had signed the contract on behalf of the Leipzig corporation, who was president of Stoehr & Sons (Inc.) and had the control of both the Botany Worsted Mills and Stoehr & Sons (Inc.), the New York corporation. It was drawn up by the attorney who had prepared the instrument in question and was approved by both corporations, the persons controlling both corporations acting for them. This was the contemporaneous construction of the instrument in question, made by all of the partiesto it and stating the intention of the parties making it. It is entirely consistent with the instrument itself, or in the absence of any obligation of the New York corporation to purchase the shares, with the right of the Leipzig corporation to terminate

the agreement, whereupon the New York corporation would lose all interest in the stock, and neither party to the agreement would have any claim or right against the other, except so far as the stock had been actually paid for. It was clearly a mere option or right to purchase the stock to justify the transfer of the shares of the stock in the name of the New York corporation, so as to provide for the voting of the stock in case there should be a contested election of the Botany Worsted Mills directors.

There is another letter from Hans E. Stoehr, dated February 5, 1918, to Mr. Heyn, who was his representative in Washington, in which he states that the majority of the stock of the Botany Worsted Mills, of Passaic, N. J., and of Stoehr & Sons (Inc.) is held by persons who are alien enemies under the Trading With the Enemy Act; that this information is given by him as treasurer of the Botany Worsted Mills and as president of Stoehr & Sons (Inc.), and the letter is signed "Hans E. Stoehr."

The stock holdings of the Botany Worsted Mills show that, without these 14,900 shares owned by the Leipzig corporation, the majority of the stock was not held by alien enemies. Thus, at the annual meeting on March 20, 1917, Stoehr & Sons (Inc.) voted 20,585 shares, which included the 14,900 shares in question, the whole number of shares being 36,000. Without these 14,900 shares there was not a majority of the stock held by alien enemies. So neither Stoehr & Sons (Inc.), nor did Hans E. Stoehr,

who had control of both corporations and who signed the instrument on behalf of the Leipzig corporation, at any time claim that Stoehr & Sons (Inc.) was the owner of this stock or had any beneficial interest in it, and neither did Stoehr & Sons (Inc.) at that time make any such claim.

When the case was tried two of the periods for which the installments were to be paid had expired, and at no time was Stoehr & Sons (Inc.) either able or willing to carry out this transaction, based upon the claim of the appellant that any interest or right was transferred to the New York corporation. The complaintant Max W. Stoehr was a member of the board of directors. After the expiration of the first year, when the first installment was due, no attempt was made at any time to comply with the contract or to provide the means with which to purchase one-fifth of these 14,900 shares. All contemporaneous constructions of the agreement agree with the views expressed by the learned judge upon the trial, that this instrument did not, and was not intended to, convey to the New York corporation the title to these shares of stock, but was a mere device to keep the voting power of a majority of the stock in the hands of the Stoehrs during the war.

Point V.

The contract between the Leipzig corporation and Stoehr & Sons (Inc.), having been made in contemplation of the declaration of war between the United States and the German Empire, the provisions thereof providing that the German enemies of the United States were to have the custody of the shares of stock therein provided for and were to receive all the consideration to be paid therefor, to carry out the contract, it was within the definition of "trading with the enemy", and was therefore unlawful after the declaration of war.

By subdivision c of the second section of the Trading With the Enemy Act, it is provided that the words "to trade" shall be deemed to mean "enter into, carry on, complete, or perform any contract, agreement, or obligation." And by subdivision e, "to have any form of business or commercial communication or intercourse with." And by section 3 it is provided that it shall be unlawful for any person in the United States to trade or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, another person, with reasonable cause to believe that such other person is an enemy or an ally of an enemy, or is conducting or taking part in such trade, directly or indirectly, for or on account of or on behalf of, or for the benefit of an enemy or ally of an enemy. By section 2 of said Act the word "enemy" is defined as being any individual, partnership, or other body of individuals resident within the territory, or resident outside of the United

States, doing business within said territory, and any corporation incorporated within said territory with which the United States is at war.

Subdivision b of section 7 provides that no conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section 3 of the Act, made after the passage of the Act, shall confer or create any right or remedy in respect thereto. And subdivision b of section 8 of the Act provides that every contract entered into prior to the beginning of the war, between any citizen of the United States or any corporation organized within the United States, and an enemy or ally of an enemy, the terms of which provide for the delivery during or after any war in which an enemy or ally of an enemy nation has been, or is now, engaged, or anything produced, mined, or manufactured in the United States, may be abrogated by such citizen or corporation.

It was thus made unlawful when that Act was passed to carry out, complete, or perform any contract, agreement, or obligation, or buy, sell, transfer, assign, or otherwise dispose of, or receive, any form of property. This contract was made in contemplation of war between the United States and Germany. (See report of Stoehr & Sons (Inc.) and Botany Worsted Mills to Alien Property Custodian, Rec. 220.)

By the contract itself the terms of sale and the purchase price of said shares were to be determined by and be equal to the book value of said shares, as

shown by the books of the Botany Worsted Mills; and the price was to be payable in five installments, the first installment to become payable one year from date, and the subsequent installments, respectively, in two, three, four, and five years from date. Thus the installment for the whole purchase price of the stock was to be paid after war was declared between the United States and the German Empire, and the certificates were to be held by, and were held by, the Leipzig corporation, and these certificates were not to be delivered until the payment of one of the five installments, which was not to be payable until one year from the date of the instrument. By the Trading With the Enemy Act it was made unlawful to carry out, complete, or perform such a contract, or to buy, sell, transfer, assign, or otherwise dispose of, or receive, any form of property, and the right of the Leipzig corporation to receive any payment under this contract or to transfer, sell, or deliver to the New York corporation any of its property in its possession was lost, and a penalty of $10,000, or 10 years in prison, was imposed upon any person doing this unlawful act. Thus this contract was expressly dissolved when the war was declared between the United States and the Empire of Germany.

In *New York Life Insurance Co.* v. *Statham* (93 U. S., p. 24) the claim made was that when the performance of a condition becomes illegal, in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war and

to have been revived with all its force when the war ended. The court in the case of a contract of life insurance refused to apply that rule, saying (p. 32):

> The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and can not be invoked to revive a contract which it would be unjust or inequitable to revive.

Here the contract was executory. It was clearly the intention of the parties that the title, both legal and beneficial, would not vest until the money was paid by the New York corporation to the Leipzig corporation. The certificates of stock were never delivered to the New York corporation, but were held in Germany, and the New York corporation was not to be vested with the title to the stock until it paid for the same by the annual payments. The whole beneficial interest in the stock was retained by the Leipzig corporation. It had possession of the stock, or the certificates representing the stock, which were not to be delivered to the New York corporation until the payments were made. It became unlawful on the passage of the Trading With the Enemy Act to make such payments. The rights of the Leipzig corporation were confiscated to the United States under the Trading With the Enemy Act, and whatever rights existed in the Leipzig corporation passed to the Alien Property Custodian. He could not enforce the contract, because by its terms the New York corporation was not bound to pay any install-

ment, and if it did not pay any of the installments its right to the stock ceased and determined.

Appellant sues as a stockholder of the New York corporation to enforce the claim that the New York corporation had that this stock was its property. He was the owner of but 44-25/100 shares of the stock of the New York corporation. The New York corporation had resolved that it would not comply with the contract, and it is clear from the evidence that it was incapable of furnishing the money that was necessary to complete the purchase of the stock. The New York corporation had only the right to possession of the stock on paying the installments when they fell due. The Leipzig corporation has never insisted upon the completion of the contract. By the express terms of the contract, if the installments were not paid when due and if the contract was not completed (by the fifth provision of the contract) "neither of said companies shall have any further claim against the other arising under or by reason of this agreement; it being understood that the nonpayment of any subsequent installment shall not affect the portion or portions of the stock which may have been fully paid for by a previous installment or installments." Rec., p. 16. No installment had been paid and the $5,000 recited in the agreement had not been actually paid by the New York corporation. There was merely a bookkeeping entry on the books of the Botany Co., charging the New York corporation with the $5,000 and crediting the German corporation with that amount. That the New York corpo-

ration would be entitled to have this bookkeeping entry canceled and that the New York corporation would be entitled to receive from the Botany Mills Co. any amount standing to its credit, irrespective of this bookkeeping entry, is not involved.

The contract for the sale was thus entirely executory. Construing this contract as an absolute sale of the property, war was threatened between the United States and the German Empire, and when the Trading With the Enemy Act was passed it was unlawful to carry it out. The property of the Leipzig company was confiscated by the United States, and the custodian took possession of it. The contract by its terms provided that neither party should have any recourse against the other if the installments were not paid at the time when they were to be paid, and thus the contract was actually terminated. Its execution was unlawful and the custodian was entitled to the stock as enemy owned stock and discharged from the illegal contract. But as the court below held, in view of the contemporaneous construction of the contract as disclosed by the evidence, and the situation of the parties at that time "all that was accomplished, and in my opinion all that was desired, was to secure the firm against dissolution in the event of war, and to insure the voting right in two Americans on whom Hans could rely, if his own right to vote on the shares became affected by his enemy character." (Rec. 313.)

But whatever construction is given to the contract, it has been the uniform holding of this court that

when war threatens, transactions respecting property which would in the event of war be subject to capture are unflinchingly and exhaustively scrutinized by the courts and with grave suspicion. Nothing short of an absolute acquisition of complete dominion of the property the *jus in rem* or *jus in re*, as distinguished from *jus ad rem*, in the utmost good faith and established by convincing proof will support a claim.

The Carlos F. Roses, 177 U. S. 655.
The Benito Estenger, 176 U. S. 568.
The Frances, 8 Cranch, 359.

A transfer of property when war is imminent is held not to be good, if subject to any condition, or even tacit understanding, by which the vendor keeps an interest in the property, or in its profits, or a control over it, or power of revocation, or a right to its restoration at the conclusion of war.

The Benito Estenger, 176 U. S. 568.

If the risk of loss be in the enemy and this is conclusive.

The Venus, 8 Cranch, 253.
The Frances, 8 Cranch, 359.

If the purchaser has the option to pay for the property or not. If the purchaser is unable to pay for the bargain.

The contract in question did not comply with any of these conditions. The property remained in the hands of the Leipzig company. The condition as to payment was entirely optional with the New York corporation.

Point VI.

The contract is void and unenforceable because Hans E. Stoehr, who attempted to execute the agreement on behalf of the Leipzig company, was the president and interested in the New York company, and thus occupying a fiduciary relation to the Leipzig corporation, was transferring to a corporation of which he was president and in which he had an interest, the property of the Leipzig corporation.

As we have before argued in this brief, under the Trading With the Enemy Act and the demand made by the custodian, all rights of the Leipzig company in relation to these 14,900 shares of the Botany Worsted Mills had vested in the custodian. Any right that the Leipzig company had to void this contract and to resist its enforcement vested in the custodian. If this contract was void as against public policy, or void for any other reason, or voidable on the election of the Leipzig company, this right vested in the custodian. With the custodian under the authority of the Act and the delegation of power to him by the President, determined that this property was owned by the Leipzig corporation, and seized it for the use of the United States, he expressly disaffirmed any right to, or title in, the property under this contract. Both the Botany Worsted Mills and Stoehr & Sons (Inc.) and Hans E. Stoehr and the appellant had notice of the claim by the custodian, and were heard by him. In the statement made on behalf of Stoehr & Sons (Inc.) it was stated that "we also stated verbally there have been

no resolutions or other corporate action" by the Leipzig corporation in confirmation of this transaction. (Rec. 222.)

That fact being before the custodian, he had the right to disaffirm the contract and take possession of the stock as the property of the Leipzig corporation. There is no claim in the bill, nor was there any proof on the trial, that Hans E. Stoehr had any express authority from the Leipzig corporation to transfer the stock to the company of which he was the president and in which he had an interest. No such authority could be given, because the New York corporation was organized only the day before the execution of the agreement claiming to transfer the stock to the New York corporation. Hans E. Stoehr thus assumed to act as the agent or representative of the Leipzig corporation. He made the contract which it is claimed transferred these 14,900 shares of stock, valued at millions of dollars, to the company of which he was president and in which he and his family only were interested without providing for any consideration to be paid for the stock, except at the option of the New York corporation, at various periods, five years in the future, with a provision that there was to be no liability on behalf of the New York corporation if it failed to perform the so-called contract.

The law of England and the United States has always been that such a transaction is void, both as against public policy and violation of the rights of the beneficiary, and nowhere has this practice been

more universally condemned than in the Federal courts.

In *Marsh* v. *Whitmore* (21 Wallace, 178), it is said (p. 184):

> The law, therefore, wisely prohibits a party selling on another's account from becoming a buyer on his own at the sale, and will always condemn transactions of that character whenever their enforcement is attempted. The complainant could have treated the purchase made by the defendant as a nullity. He could have insisted that the relation of the defendant to the property was not changed by the proceeding, and that he stood charged with the same trust respecting it with which he was charged previously.

In *Wardell* v. *Railroad Co.* (103 U. S. 651), a contract was made with defendant railroad company under which the plaintiff was to share in the profits. In that case a judgment refusing to enforce the contract or allow the plaintiff to have any benefit under it was affirmed. The court held that such a contract was indefensible and illegal and that the directors constituting the executive committee of the board were clothed with power to manage the affairs of the company for the benefit of the stockholders and creditors; that their character as agents forbade the exercise of their power for their own personal ends against the interest of the company. The court then said (p. 658):

> It is among the rudiments of the law that the same person can not act for himself and

> at the same time, with respect to the same matter, as the agent of another whose interests are conflicting.

And subsequently, the court, after quoting *Marsh* v. *Whitmore* (21 Wallace, 178), said (p. 658):

> Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They can not, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration.

See also case of *Davis* v. *Las Ovas Company (Inc.)*, 227 U. S. 80.

An extremely interesting case is *Munson et al.* v. *S. G. & C. R. R. Co. et al.* (103 N. Y., 58). In that case the officers and directors of a corporation carried through its board of directors a resolution providing for a contract which was for the benefit of the directors against the corporate interest. At page 73 the court said:

> But we are of opinion that the contract of September 14, 1875, is repugnant to the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents. * * * The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. * * * The law can not accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry, in an action by the trustee in his private capacity, to enforce the contract in the making of which he participated. The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trus-

tees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative.

The same principle is established in *Billings* v. *Shaw* (209 N. Y., 265), in which it is said that such a contract with a third person is not made valid, although the acts of the unfaithful agent may have in fact resulted in benefit to his principals. *Lum* v. *McEwen*, 56 Minn., 278. Nor by the fact that the unfaithful director of the corporation informed his codirectors of his corrupt bargain.

See also—

Continental Securities Co. v. *Belmont*, 206 N. Y. 7.

Brooklyn Heights R. R. Co. v. *Brooklyn City Railway Co.*, 151 N. Y. App. Div., 465.

Hans E. Stoehr, assuming to act as an agent or representative of the Leipzig company, made a contract with the New York company, of which he was president and a stockholder, to transfer from the Leipzig corporation to the New York corporation 14,900 shares of the stock of the Botany Mills, worth over $5,000,000, on the payment of $5,000, which was never actually paid. He engineered the whole transaction and made a pretense of payment by crediting the Leipzig corporation with $5,000 on the books of the Botany Mills, and charging it against the New York corporation, and now plaintiff seeks to enforce that transaction as a valid sale of $5,000,000 worth of stock on a pretended payment of $5,000, and

without having paid, or offered to pay, or expressing its willingness or ability to pay, the consideration prescribed in the so-called contract. To appeal to a court of equity to enforce that contract as against the principal of Hans E. Stoehr or its successor in interest violates the whole principle upon which courts of equity deal with contracts made under such circumstances.

Point VII.

Appellant can not maintain this suit as a stockholder of the New York corporation to enforce the right of the corporation.

By the Twenty-seventh Equity Rule of Practice for the courts of equity in the United States it is provided that every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded upon rights which may properly be asserted by the corporation—

> must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law * * *. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons, for not making such effort.

The only allegation in the bill is that of the eighteenth paragraph alleging that on November

20 appellant protested to the custodian against the proposed sale of the shares of stock. On November 23, 1918, appellant filed with the custodian his notice of claim under section 9 of the Trading With the Enemy Act, but that his protest was ignored; that the said defendant directors of said Stoehr & Sons (Inc.) are the creatures of and were nominated and elected by and through the orders of the said defendant, A. Mitchell Palmer, custodian, and to carry out his instructions, and that it would be useless to make demand upon said defendant directors to institute suit, and that for such reason he is obliged to appeal for relief to a court of equity.

It is settled law that the mere fact that the directors were elected by stockholders against whom a cause of action is sought to be enforced is not sufficient to justify a stockholder from failing to secure action by the board of directors or other managing officers of the corporation.

Mr. Palmer as custodian was acting as an officer of the United States to carry out the law of Congress. He had no personal interest in the transaction; no judgment against him could affect him personally; and certainly the mere fact that he had voted for the directors as the holder of stock which had come into his hands as the property of an enemy alien was no reason why the directors should not bring an action if they had been requested to do so, and it was a proper action to bring.

Mr. Palmer was examined as a witness for the defendant. He disclaimed any attempt to influence

the directors in the administration of the trust, and there is not the slightest particle of evidence to show that he ever did influence them, or that the refusal of the directors to sue on behalf of the New York corporation was anything but an exercise of their best judgment and for the benefit of the New York corporation, its creditors and stockholders.

Post v. *Buck Stove & Range Co.*, 200 Fed. Rep., 918.

This was an action by a minority stockholder of a corporation to enforce a claim in favor of the corporation.

In *O'Connor* v. *Va. P. & P. Co.* (184 N. Y., 46), at page 53, the Court of Appeals expressly held that the allegation that—

> the new directors were "subservient to the domination and dictation of said Frank Jay Gould and Helen Miller Gould" [was not] sufficient to prove that they would not prosecute against the Goulds a well-founded cause of action. It is not necessarily through dishonest or improper motives that persons may be subject to the domination and dictation of others. If the directors were the same as those who committed the wrongs, or if they were acting fraudulently, dishonestly or collusively with the Goulds for the purpose of defrauding the corporation in the latter's interest, it was very easy to say so and there is no reason why the charge should not be explicitly and unequivocally made.

In *Heinz* v. *National Bank of Commerce* (237 Fed. Rep., 942) the same rule is applied.

See also *Brewer* v. *Boston Theatre*, 104 Mass., 378.

But the evidence in this case shows that whether or not the directors should enforce this so-called contract was a fair question for determination by the directors of the company, and it is settled that a court of equity, where a fair question is presented, will not overrule the discretion of directors made in good faith.

In 10 Cyc. 965–967 the question is discussed. The general rule is stated at paragraph 12, page 969, that equity will not interfere on questions of corporate management or policy. The true distinction is between acts in excess of the powers of directors and in breach of their trust and acts which are within their powers and which merely involve an exercise of the discretion committed to them. And in 10 Cyc., paragraph 7, page 965, it is said that if the directors are guilty of a breach of trust injurious to the corporate property or to the rights of the shareholders, or a portion of them, and if the corporation refuses to institute the proper proceedings to restrain or redress such injury, one or more of the shareholders may do it in their individual names.

In order that this jurisdiction may be invoked in cases not governed by statute, there must ordinarily occur: (1) The matter complained of must be a breach of duty on the part of the directors, (2) the corporation must fail or refuse to demand redress, and (3) there must be an injury to the shareholder.

In 7 Ruling Case Law at page 331, section 308, the same question is discussed. It is there said that corporations represent their stockholders in all matters within the scope of their corporate powers, and this is true respecting litigation as well as other matters. Stockholders can not ordinarily maintain a suit to enforce any right of the corporation. The privilege belongs to the corporation itself, acting through its directors, and the mere failure of the directors to bring suit does not entitle any stockholder to do so.

See also 7 Ruling Case Law, pages 491, 492, section 473, where it is said that a very wide discretion is necessarily reposed in the directors of a corporation and that it is not the duty of the managers of such association to bring suit upon every supposed wrong or injury to the corporation.

See also Fletcher's Cyc. on Corporations, vol. 6, section 4065, where the rule is particularly well stated. It is there said:

> So long as they [the directors] act, not fraudulently, illegally or oppressively, but in good faith, in the exercise of their discretion, and for what they deem to be the best interests of the company, a court of equity has no jurisdiction to interfere at the suit of a dissenting stockholder or a dissenting minority of the stockholders. Such a suit can not be maintained by showing mere mistake or error of judgment on the part of the directors or majority of the stockholders. Their conduct must be *ultra vires*, illegal, fraudulent or oppressive.

And the court is asked to read this whole section and the authorities cited under it.

See also sections 4066 and 4075.

The same principle is the settled law of the State of New York.

See *Leslie* v. *Lorillard*, 110 N. Y., 519, where it is said the courts will not interfere unless the powers of the directors have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive or destructive of the rights of the stockholders.

In *Hawes* v. *Oakland* (104 U. S., 450), a leading case on the subject in the United States, the question is discussed, and it was there held that to enable a stockholder of a corporation to sustain in a court of equity in his own name a suit founded on a right of action existing in the corporation itself, there must exist as the foundation for the suit some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other sources of organization, or such a fraudulent transaction completed or contemplated by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation or to the interest of the other shareholders, or where the board of directors or majority of them are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other shareholders. And the limita-

tions of minority stockholders to enforce a claim of the corporation are illustrated in the cases of—

Fleitmann v. *Welsbach Co.*, 240 U. S., 27; and

United Copper Co. v. *Amalgamated Copper Co.*, 244 U. S., 261.

In the latter case the court said (pp. 263, 264):

> Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery.

In the present case it appears from the evidence that the directors considered the question of attempting to enforce this contract. They took the advice of counsel on the question as to whether the contract was enforceable, and that advice was asked for at the time that the plaintiff was a member of the board of directors, and he made no request that the contract be enforced. Counsel for the company reported that the contract was not enforceable and that it was not to the interest of the corporation to enforce it, and the directors, considering the whole question, determined, in the absence of any requests from any stockholder to enforce the contract, that

it was for the best interest of the corporation of which they were directors not to attempt to recover the stock. This question was clearly one of sound business judgment of the directors. To recover the stock it would be necessary to pay at the time two installments of substantially a million dollars each, and a third installment would be due within a few months. The corporation had no money to pay these installments and it has not been suggested by the evidence or by the counsel for the plaintiff how the money could be obtained. It must be clear to the court that it would not be to the benefit of the New York company, with its capital of $250,000, to undertake to pay the large amount involved in an attempt to enforce this so-called contract.

For the benefit of the German stockholders it might be of advantage to prevent the sale of the property until after peace was declared. But this court is not solicitous to prevent the United States, from recovering this $5,000,000, which will be the result of the sale of this stock for the United States, and hold it over for these German stockholders, who, after peace is declared, could merely demand from the New York company the payment of the installments, then abrogate the contract and repossess themselves of the stock. Viewing it in the interest of the New York corporation itself and its creditors and stockholders, certainly the court can not say that it was so clearly to the benefit of the corporation to enforce the so-called contract, if it was enforceable, as to indicate fraud or bad faith on the part of the directors when

they determined it was not for the benefit of the New York corporation to enforce it.

It is submitted that the appellant has failed to prove any fact that would justify the court in entertaining a bill by a minority stockholder to enforce this cause of action which it is claimed exists in favor of the New York corporation.

Conclusion.

The judgment appealed from should be affirmed.

Respectfully submitted.

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